CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

Bureau of Customs and Border Protection

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 37 **JULY 16, 2003** **NO. 29**

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DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER PROTECTION

NOTICE

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Bureau of Customs and Border Protection

[CBP 03–03]

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR JUNE, 2003

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 03-25 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday(s): None

Australia dollar:

June 1, 2003	$0.651300
June 2, 2003	.656400
June 3, 2003	.659900
June 4, 2003	.665700
June 5, 2003	.667400
June 6, 2003	.659100
June 7, 2003	.659100
June 8, 2003	.659100
June 9, 2003	.658300
June 10, 2003	.656500
June 11, 2003	.664200
June 12, 2003	.665200
June 13, 2003	.667100
June 14, 2003	.667100
June 15, 2003	.667100
June 16, 2003	.667600
June 17, 2003	.671700
June 18, 2003	.672900
June 19, 2003	.669600
June 20, 2003	.667500
June 21, 2003	.667500
June 22, 2003	.667500
June 23, 2003	.664300
June 24, 2003	.662200
June 25, 2003	.672300

FOREIGN CURRENCIES—Variances from quarterly rates for June 2003 continued):

Australia dollar: (continued):

June 26, 2003	.665100
June 27, 2003	.665500
June 28, 2003	.665500
June 29, 2003	.665500
June 30, 2003	.671300

Brazil real:

June 1, 2003	$0.335683
June 2, 2003	.335909
June 3, 2003	.337610
June 4, 2003	.341880
June 5, 2003	.345185
June 6, 2003	.346620
June 7, 2003	.346620
June 8, 2003	.346620
June 9, 2003	.347826
June 10, 2003	.348311
June 11, 2003	.347584
June 12, 2003	.349040
June 13, 2003	.350140
June 14, 2003	.350140
June 15, 2003	.350140
June 16, 2003	.350263
June 17, 2003	.346500
June 18, 2003	.343997
June 19, 2003	.346141
June 20, 2003	.346861
June 21, 2003	.346861
June 22, 2003	.346861
June 23, 2003	.346380
June 24, 2003	.349528
June 25, 2003	.349650
June 26, 2003	.344828
June 27, 2003	.346981
June 28, 2003	.346981
June 29, 2003	.346981
June 30, 2003	.349406

Canada dollar:

June 1, 2003	$0.729288
June 2, 2003	.730140
June 3, 2003	.726322
June 4, 2003	.736648
June 5, 2003	.746046
June 6, 2003	.738552
June 7, 2003	.738552
June 8, 2003	.738552
June 9, 2003	.736106
June 10, 2003	.732654
June 11, 2003	.739481
June 12, 2003	.741180

FOREIGN CURRENCIES—Variances from quarterly rates for June 2003 continued):

Canada dollar: (continued):

June 13, 2003	.748391
June 14, 2003	.748391
June 15, 2003	.748391
June 16, 2003	.746436
June 17, 2003	.746659
June 18, 2003	.749176
June 19, 2003	.740302
June 20, 2003	.735835
June 21, 2003	.735835
June 22, 2003	.735835
June 23, 2003	.737409
June 24, 2003	.734538
June 25, 2003	.744713
June 26, 2003	.738443
June 27, 2003	.741070
June 28, 2003	.741070
June 29, 2003	.741070
June 30, 2003	.737572

Denmark krone:

June 1, 2003	$0.158421
June 2, 2003	.158128
June 3, 2003	.157642
June 4, 2003	.157612
June 5, 2003	.159923
June 6, 2003	.157480
June 7, 2003	.157480
June 8, 2003	.157480
June 9, 2003	.158043
June 10, 2003	.157381
June 11, 2003	.158516
June 12, 2003	.158416
June 13, 2003	.159324
June 14, 2003	.159324
June 15, 2003	.159324
June 16, 2003	.159530
June 17, 2003	.159066
June 18, 2003	.157604
June 19, 2003	.157287
June 20, 2003	.156421
June 21, 2003	.156421
June 22, 2003	.156421
June 23, 2003	.155497
June 24, 2003	.154847
June 25, 2003	.155945
June 30, 2003	.154775

New Zealand dollar:

June 17, 2003	$0.585100
June 18, 2003	.584000
June 19, 2003	.582500

FOREIGN CURRENCIES—Variances from quarterly rates for June 2003 continued):

New Zealand dollar: (continued):

June 20, 2003	.584500
June 21, 2003	.584500
June 22, 2003	.584500
June 23, 2003	.585400
June 24, 2003	.584600
June 25, 2003	.588100
June 26, 2003	.582500
June 27, 2003	.582500
June 28, 2003	.582500
June 29, 2003	.582500
June 30, 2003	.586600

Norway krone:

June 1, 2003	$0.149439
June 2, 2003	.148699

Sweden krona:

June 1, 2003	$0.128776
June 2, 2003	.128650
June 3, 2003	.128296
June 4, 2003	.128192
June 5, 2003	.130302
June 6, 2003	.128222
June 7, 2003	.128222
June 8, 2003	.128222
June 9, 2003	.128626
June 10, 2003	.128222
June 11, 2003	.129408
June 12, 2003	.129450
June 13, 2003	.130149
June 14, 2003	.130149
June 15, 2003	.130149
June 16, 2003	.130361
June 17, 2003	.130242
June 18, 2003	.129099
June 19, 2003	.128753
June 20, 2003	.128008
June 21, 2003	.128008
June 22, 2003	.128008
June 23, 2003	.126711
June 24, 2003	.125597
June 25, 2003	.126422
June 26, 2003	.124595
June 27, 2003	.124517
June 28, 2003	.124517
June 29, 2003	.124517
June 30, 2003	.125023

United Kingdom Pound sterling:

June 5, 2003	$1.659700

FOREIGN CURRENCIES—Variances from quarterly rates for June 2003 continued):

United Kingdom Pound sterling: (continued):

June 6, 2003	1.662200
June 7, 2003	1.662200
June 8, 2003	1.662200
June 11, 2003	1.667500
June 12, 2003	1.668200
June 13, 2003	1.667600
June 14, 2003	1.667600
June 15, 2003	1.667600
June 16, 2003	1.681500
June 17, 2003	1.684000
June 18, 2003	1.679800
June 19, 2003	1.674000
June 20, 2003	1.664400
June 21, 2003	1.664400
June 22, 2003	1.664400
June 23, 2003	1.668200
June 24, 2003	1.660700
June 25, 2003	1.678700
June 26, 2003	1.664000

Dated: July 1, 2003

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

[CBP 03–04]

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR JUNE, 2003

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday(s): None

European Union euro:

June 1, 2003	$1.176600
June 2, 2003	1.174400
June 3, 2003	1.170200
June 4, 2003	1.170800
June 5, 2003	1.187000
June 6, 2003	1.169500
June 7, 2003	1.169500

FOREIGN CURRENCIES—Daily rates for Countries not on quarterly list for June 2003 (continued):

European Union euro: (continued):

June 8, 2003	1.169500
June 9, 2003	1.174300
June 10, 2003	1.168600
June 11, 2003	1.176400
June 12, 2003	1.176700
June 13, 2003	1.183000
June 14, 2003	1.183000
June 15, 2003	1.183000
June 16, 2003	1.184300
June 17, 2003	1.181200
June 18, 2003	1.171000
June 19, 2003	1.167800
June 20, 2003	1.161600
June 21, 2003	1.161600
June 22, 2003	1.161600
June 23, 2003	1.154800
June 24, 2003	1.149800
June 25, 2003	1.159200
June 26, 2003	1.142900
June 27, 2003	1.142300
June 28, 2003	1.142300
June 29, 2003	1.142300
June 30, 2003	1.150200

South Korea won:

June 1, 2003	$0.000826
June 2, 2003	.000831
June 3, 2003	.000832
June 4, 2003	.000833
June 5, 2003	.000833
June 6, 2003	.000833
June 7, 2003	.000833
June 8, 2003	.000833
June 9, 2003	.000836
June 10, 2003	.000837
June 11, 2003	.000837
June 12, 2003	.000838
June 13, 2003	.000839
June 14, 2003	.000839
June 15, 2003	.000839
June 16, 2003	.000840
June 17, 2003	.000844
June 18, 2003	.000844
June 19, 2003	.000833
June 20, 2003	.000840
June 21, 2003	.000840
June 22, 2003	.000840
June 23, 2003	.000840
June 24, 2003	.000838
June 25, 2003	.000842
June 26, 2003	.000843
June 27, 2003	.000837

FOREIGN CURRENCIES—Daily rates for Countries not on quarterly list for June 2003 (continued):

South Korea won: (continued):

June 28, 2003	.000837
June 29, 2003	.000837
June 30, 2003	.000836

Taiwan N.T. dollar:

June 1, 2003	$0.028810
June 2, 2003	.028818
June 3, 2003	.028818
June 4, 2003	.028835
June 5, 2003	.028835
June 6, 2003	.028835
June 7, 2003	.028835
June 8, 2003	.028835
June 9, 2003	.028835
June 10, 2003	.028835
June 11, 2003	.028818
June 12, 2003	.028818
June 13, 2003	.028860
June 14, 2003	.028860
June 15, 2003	.028860
June 16, 2003	.028902
June 17, 2003	.028969
June 18, 2003	.028944
June 19, 2003	.028902
June 20, 2003	.028910
June 21, 2003	.028910
June 22, 2003	.028910
June 23, 2003	.028902
June 24, 2003	.028902
June 25, 2003	.028935
June 26, 2003	.028902
June 27, 2003	.028893
June 28, 2003	.028893
June 29, 2003	.028893
June 30, 2003	.028893

Dated: July 1, 2003

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

[CBP 03–05]

FOREIGN CURRENCIES

RE: SECTION 159.34 CFR

SUBJECT: CERTIFIED RATES OF FOREIGN EXCHANGE: THIRD QUARTER, 2003

LISTED BELOW ARE THE BUYING RATES CERTIFIED FOR THE QUARTER TO THE SECRETARY OF THE TREASURY BY THE FEDERAL RESERVE BANK OF NEW YORK UNDER PROVISION OF 31 USC 5151. THESE QUARTERLY RATES ARE APPLICABLE THROUGHOUT THE QUARTER EXCEPT WHEN THE CERTIFIED DAILY RATES VARY BY 5% OR MORE. SUCH VARIANCES MAY BE OBTAINED BY CALLING (646) 733-3065 OR (646)733-3057.

QUARTER BEGINNING JULY 1, 2003 AND ENDING SEPTEMBER 30, 2003

COUNTRY	CURRENCY	U.S. DOLLARS
AUSTRALIA	DOLLAR	$0.676000
BRAZIL	REAL	$0.351000
CANADA	DOLLAR	$0.741180
CHINA, P.R.	YUAN	$0.120809
DENMARK	KRONE	$0.155800
HONG KONG	DOLLAR	$0.128231
INDIA	RUPEE	$0.021510
JAPAN	YEN	$0.008372
MALAYSIA	RINGGIT	$0.263158
MEXICO-	NEW PESO	$0.095648
NEW ZEALAND	DOLLAR	$0.594700
NORWAY	KRONE	$0.140036
SINGAPORE	DOLLAR	$0.569411
SOUTH AFRICA	RAND	$0.134363
SRI LANKA	RUPEE	$0.010293
SWEDEN	KRONA	$0.125534
SWITZERLAND	FRANC	$0.745601
THAILAND	BAHT	$0.023838
UNITED KINGDOM	POUND STERLING	$1.662600
VENEZUELA	BOLIVAR	$0.000625

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

Bureau of Customs and Border Protection

General Notices

QUARTERLY IRS INTEREST RATES USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS ON CUSTOMS DUTIES

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This notice advises the public of the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of Customs duties. For the calendar quarter beginning July 1, 2003, the interest rates for overpayments will be 4 percent for corporations and 5 percent for non-corporations, and the interest rate for underpayments will be 5 percent. This notice is published for the convenience of the importing public and Customs personnel.

EFFECTIVE DATE: July 1, 2003.

FOR FURTHER INFORMATION CONTACT: Ronald Wyman, Accounting Services Division, Accounts Receivable Group, 6026 Lakeside Boulevard, Indianapolis, Indiana 46278; telephone 317/298–1200, extension 1349.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of Customs duties must be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 was amended (at paragraph (a)(1)(B) by the Internal Revenue Service Restructuring and Reform Act of 1998, Public Law 105–206, 112 Stat. 685) to provide different interest rates applicable to overpayments: one for corporations and one for non-corporations.

The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service (IRS) on behalf of the

Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2003–63 (*see*, 2003–25 IRB 1037, dated June 23, 2003), the IRS determined the rates of interest for the calendar quarter beginning July 1, 2003, and ending September 30, 2003. The interest rate paid to the Treasury for underpayments will be the Federal short-term rate (2%) plus three percentage points (3%) for a total of five percent (5%). For corporate overpayments, the rate is the Federal short-term rate (2%) plus two percentage points (2%) for a total of four percent (4%). For overpayments made by non-corporations, the rate is the Federal short-term rate (2%) plus three percentage points (3%) for a total of five percent (5%). These interest rates are subject to change for the calendar quarter beginning October 1, 2003, and ending December 31, 2003.

For the convenience of the importing public and Customs personnel the following list of IRS interest rates used, covering the period from before July of 1974 to date, to calculate interest on overdue accounts and refunds of Customs duties, is published in summary format.

Beginning Date	*Ending Date*	*Under-payments* (percent)	*Over-payments* (percent)	*Corporate Over-payments* (Eff. 1–1–99) (percent)
070174	063075	6%	6%	
070175	013176	9%	9%	
020176	013178	7%	7%	
020178	013180	6%	6%	
020180	013182	12%	12%	
020182	123182	20%	20%	
010183	063083	16%	16%	
070183	123184	11%	11%	
010185	063085	13%	13%	
070185	123185	11%	11%	
010186	063086	10%	10%	
070186	123186	9%	9%	
010187	093087	9%	8%	
100187	123187	10%	9%	
010188	033188	11%	10%	
040188	093088	10%	9%	
100188	033189	11%	10%	
040189	093089	12%	11%	
100189	033191	11%	10%	
040191	123191	10%	9%	
010192	033192	9%	8%	
040192	093092	8%	7%	
100192	063094	7%	6%	
070194	093094	8%	7%	
100194	033195	9%	8%	

Beginning Date	*Ending Date*	*Under-payments* (percent)	*Over-payments* (percent)	*Corporate Over-payments* (Eff. 1–1–99) (percent)
040195	063095	10%	9%	
070195	033196	9%	8%	
040196	063096	8%	7%	
070196	033198	9%	8%	
040198	123198	8%	7%	
010199	033199	7%	7%	6%
040199	033100	8%	8%	7%
040100	033101	9%	9%	8%
040101	063001	8%	8%	7%
070101	123101	7%	7%	6%
010102	123102	6%	6%	5%
010103	093003	5%	5%	4%

Dated: June 30, 2003

ROBERT C. BONNER,
Commissioner,
Customs and Border Protection.

AGENCY INFORMATION COLLECTION ACTIVITIES: HARBOR MAINTENANCE FEE

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Proposed collection; comments requested.

SUMMARY: The Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995: Harbor Maintenance Fee. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with a change to the burden hours. This document is published to obtain comments form the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (68 FR 19557–19558) on April 21, 2003, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before July 31, 2003.

ADDRESSES: Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Department of Treasury Desk Officer, Washington, D.C. 20503. Additionally comments may be submitted to OMB via facsimile to (202) 395–7285.

SUPPLEMENTARY INFORMATION:

The Bureau of Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act of 1995 (Pub. L.104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the Proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of The proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Title: Harbor Maintenance Fee
OMB Number: 1651–0055
Form Number: Forms 349 and 350
Abstract: This collection of information will be used to verify that the Harbor Maintenance Fee paid is accurate and current for each individual, importer, exporter, shipper, or cruise line.
Current Actions: This submission is being submitted to extend the expiration date with a change to the burden hours.
Type of Review: Extension (with change)
Estimated Number of Respondents: 5,200
Estimated Time Per Respondent: 40 minutes
Estimated Total Annual Burden Hours: 2,816
Estimated Total Annualized Cost on the Public: $42,240

If additional information is required contact: Tracey Denning, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.2.C, Washington, D.C. 20229, at 202–927–1429.

Dated: June 23, 2003

TRACEY DENNING,
Agency Clearance Officer,
Information Services Branch.

[Published in the Federal Register, July 1, 2003 (68 FR 39109)]

AGENCY INFORMATION COLLECTION ACTIVITIES: CONDITIONALLY FREE UNDER CONDITIONS OF EMERGENCY

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Proposed collection; comments requested.

SUMMARY: The Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995: Conditionally Free Under Conditions of Emergency. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended without a change to the burden hours. This document is published to obtain comments form the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (68 FR 20396) on April 25, 2003, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before July 31, 2003.

ADDRESSES: Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Department of Treasury Desk Officer, Washington, D.C. 20503. Additionally comments may be submitted to OMB via facsimile to (202) 395–7285.

SUPPLEMENTARY INFORMATION:

The Bureau of Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written

comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act of 1995 (Pub. L.104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the Proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of The proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Title: Free Admittance Under Conditions of Emergency
OMB Number: 1651–0044
Form Number: N/A
Abstract: This collection of information will be used in the event of emergency or catastrophic event to monitor goods temporarily admitted for the purpose of rescue or relief.
Current Actions: This submission is to extend the expiration date without a change to the burden hours.
Type of Review: Extension (without change)
Affected Public: Business or other for-profit.
Estimated Number of Respondents: 1
Estimated Time Per Respondent: 1 minute
Estimated Total Annual Burden Hours: 1
Estimated Total Annualized Cost on the Public: N/A

If additional information is required contact: Tracey Denning, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.2.C, Washington, D.C. 20229, at 202–927–1429

Dated: June 23, 2003

TRACEY DENNING,
Agency Clearance Officer,
Information Services Branch.

[Published in the Federal Register, July 1, 2003 (68 FR 39109)]

NEW DATE FOR OCTOBER 2003 CUSTOMS BROKERS LICENSE EXAMINATION

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: General notice

SUMMARY: This document announces that Customs and Border Protection has changed the date on which the semi-annual written examination for an individual's broker's license will be held in October 2003.

DATES: The customs broker's license examination scheduled for October 2003 will be held on Tuesday, October 7.

FOR FURTHER INFORMATION CONTACT: Alice Buchanan, Office of Field Operations (202–927–2673)

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 641 of the Tariff Act of 1930, as amended (19 U.S.C. 1641), provides that a person (an individual, corporation, association, or partnership) must hold a valid customs broker's license and permit in order to transact customs business on behalf of others, sets forth standards for the issuance of broker's licenses and permits, and provides for the taking of disciplinary action against brokers that have engaged in specified types of infractions. In the case of an applicant for an individual broker's license, section 641 provides that an examination may be conducted to determine the applicant's qualifications for a license.

The regulations issued under the authority of section 641 are set forth in part 111 of the Customs Regulations (19 CFR part 111). Part 111 includes detailed rules regarding the licensing of, and granting of permits to, persons desiring to transact customs business as customs brokers, including the qualifications required of applicants and the procedures for applying for licenses and permits. Section 111.11 sets forth the basic requirements for a broker's license and, in paragraph (a)(4), provides that an applicant for an individual broker's license must attain a passing grade on a written examination taken within the 3-year period before submission of the license application prescribed under § 111.12. Section 111.13 sets forth the requirements and procedures for the written examination for an individual broker's license. Paragraph (b) of § 111.13 concerns the date and place of the examination and, prior to the recent amendment to the Customs Regulations discussed below, provided that written customs broker license examinations were given on the first Monday in April and October.

Recognizing that the first Monday in October 2003 (October 6) coincides with the observance of Yom Kippur, Customs and Border Protection (CBP) published in the **Federal Register** (68 FR 31976) on May 29, 2003, an interim rulemaking allowing for the adoption of alternative examination dates in order to avoid conflicts with national holidays, religious observances, and other foreseeable events. Section 111.13(b) was amended to provide that CBP, in those circumstances, could publish a notice in the Federal Register changing the examination date from its usual timing. Accordingly, this document announces that CBP has scheduled the October 2003 customs broker's license examination for Tuesday, October 7.

Dated: June 30, 2003

JAYSON P. AHERN,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, July 7, 2003 (68 FR 40282)]

AGENCY INFORMATION COLLECTION ACTIVITIES: DECLARATION FOR FREE ENTRY OF RETURNED AMERICAN PRODUCTS

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Proposed collection; comments requested.

SUMMARY: The Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995: Declaration for Free Entry of Returned American Products. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended without a change to the burden hours. This document is published to obtain comments form the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (68 FR 20396–20397) on April 25, 2003, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before August 6, 2003.

ADDRESSES: Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of

Management and Budget, Office of Information and Regulatory Affairs, Attention: Department of Treasury Desk Officer, Washington, D.C. 20503. Additionally comments may be submitted to OMB via facsimile to (202) 395–7285.

SUPPLEMENTARY INFORMATION:

The Bureau of Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act of 1995 (Pub. L.104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the Proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of The proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Title: Declaration of Free entry of Returned American Products
OMB Number: 1651–0011
Form Number: Form–3311
Abstract: This collection of information is used as a supporting documents which substantiates the claim for duty free status for returning
Current Actions: This submission is to extend the expiration date without a change to the burden hours.
Type of Review: Extension (without change)
Affected Public: Business or other for-profit, Individuals.
Estimated Number of Respondents: 12,000
Estimated Time Per Respondent: 210 minutes
Estimated Total Annual Burden Hours: 51,000
Estimated Total Annualized Cost on the Public: $198,000
If additional information is required contact: Tracey Denning, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.2.C, Washington, D.C. 20229, at 202–927–1429.

Dated: June 26, 2003

TRACEY DENNING,
Agency Clearance Officer,
Information Services Branch.

[Published in the Federal Register, July 7, 2003 (68 FR 40281)]

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
Washington, DC, July 2, 2003,

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

MICHAEL T. SCHMITZ,
Assistant Commissioner,
Office of Regulations and Rulings.

REVOCATION OF CLASSIFICATION LETTER AND REVOCATION OF TREATMENT RELATING TO CLASSIFICATION OF FEATHER BOAS

AGENCY: Bureau of Customs and Border Protection, Dept. of Homeland Security

ACTION: Notice of revocation of one ruling letter and revocation of treatment relating to the classification of feather boas.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs and Border Protection (CBP) is revoking a ruling letter relating to the classification of feather boas under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Similarly, CBP is revoking any treatment previously accorded by it to substantially identical merchandise. Notice of the proposed action was published on May 7, 2003 in the CUSTOMS BULLETIN in Volume 37, Number 19. One comment was received in response to this notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after September 16, 2003.

FOR FURTHER INFORMATION CONTACT: Teresa Frazier, Textiles Branch, at (202) 572–8824.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under Customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, notice proposing to revoke New York Ruling Letter (NY) C88185, dated June 5, 1998, and to revoke any treatment accorded to substantially identical merchandise was published in the May 7, 2003 CUSTOMS BULLETIN, Volume 37, Number 19. Customs accepted one timely received comment in response to this notice. Further, it is noted that the Proposed Notice inadvertently had attached HQ 963561 dated January 24, 2002 (identified as "Attachment C", but not referenced in the Notice). However, HQ 963561 is not affected by this recent publication.

In NY C88185 dated June 5, 1998, Customs classified a "Dazzling Dreams Feather Boa" as a festive article in subheading 9505.90.6000, Harmonized Tariff Schedule of the United States Annotated. In C88185, the boa's classification was based on whether it was of a flimsy construction and lacking durability and generally not recognized as a normal apparel article. Upon review of this ruling, CBP has determined that the merchandise's classification as a festive article was incorrect. Rather, Customs finds the classification should be as an article of feathers within heading 6701, HTSUSA. Accordingly, we are revoking NY C88185 to reflect proper classification within heading 6701, HTSUSA, as set forth in the analysis of HQ 965912 (see "Attachment" to this document).

In the one comment, an importer references HQ 965455 dated April 18, 2002 and notes that HQ 965455 stated that "dress-up sets are classified in subheading 9503.70, HTSUS." The importer also adds that if dress-up sets are classified in subheading 9503.70, HTSUSA, then individual articles of dress-up sets would be classified in this respective subheading. We disagree. HQ 965455 clearly references EN 95.03, which states that "sets" are "two or more differ-

ent types of articles (principally for amusement), put up in the same packing for retail sale without repacking." However, the boa of NY C88185 does not constitute a set as stated in the definition of dress-up sets of EN 95.03. Rather, it is an item that may be a part of a dress-up set of heading 9503, HTSUSA, provided when it is combined with other items of the set, generally toys, the articles create a "dress-up set" that is illustrative of the recreation or work of a person or profession. If the item is imported alone, it may be classified elsewhere. In this instance, the subject boa is imported alone, and thus it is not classifiable in subheading 9503, HTSUSA.

As stated in the notice of proposed revocation, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised CBP during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625 (c)(2)), as amended by section 623 of Title VI, CBP is revoking any treatment previously accorded by CBP to substantially identical merchandise. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, CBP's personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or CBP's previous interpretation of the HTSUS. Any person involved with substantially identical merchandise should have advised CBP during the comment period. An importer's reliance on treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), CBP is revoking NY C88185, and any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in HQ 965912, which is attached to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by the CBP to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

DATED: June 25, 2003

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 965912
June 25, 2003
CLA–2 RR:CR:GC 965912 TF
CATEGORY: Classification
TARIFF NO.: 6701.00.3000

MR. KIMYOUNG
BDP INTERNATIONAL, INC.
2721 Walker NW
Grand Rapids, MI 49504

RE: Revocation of NY C88185; children's feather boa; Chapter 95, HTSUSA; *Midwest of Cannon Falls, Inc. v. United States*; HQ 963561, dated January 24, 2002

DEAR MR. YOUNG:

Pursuant to your request dated May 20, 1998 for a binding tariff classification ruling of certain children's feather boa on behalf of your client Meijer, Inc., Customs issued NY C88185, dated June 5, 1998. In NY C88185, Customs classified the subject children's feather boa as a festive article within subheading 9505.90.6000, Harmonized Tariff Schedule of the United States Annotated.

Upon review, the Bureau of Customs and Border Protection (CBP) has determined that the merchandise was erroneously classified. This ruling letter sets forth the correct classification determination.

Pursuant to section 625(c), Tariff Act of 1930, as amended by section 623 of Title VI (customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub.L. 103–182, 107 Stat. 2057, 2186 (1993) notice of the proposed revocation of NY C88185 was published on May 7, 2003,in Vol. 37, No. 19 of the CUSTOMS BULLETIN. One timely received comment was submitted in response to this notice.

FACTS:

"Dazzling Dreams Feather Boa," item #862335, is made up of turkey feathers and measures five feet in length. The boa is available in purple, pink and white colors. It will be imported wrapped around a hanger-style cardboard for display purposes. It is indicated in the facts of NY C88185 that the article is marketed for use by children in playing "dress-up."

ISSUE:

What is the classification of the subject children's feather boa?

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1, HTSUS, provides that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, HTSUS, and if the headings or notes do not require otherwise, the remaining GRIs 2 through 6, HTSUS, may be applied.

The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System are the official interpretation of the Harmonized System at the international level. The ENs, although not dispositive provide a commentary on the scope of each heading of the HTSUS. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Chapter 67, HTSUSA, provides for, among other things, articles made of feathers. Heading 6701, HTSUSA, provides for "[s]kins and other parts of birds with their feathers or down, feathers, parts of feathers, down and articles thereof (other than goods of heading 0505 and worked quills and scapes)." EN 67.01(B)(3) states that

heading 6701 includes "Trimmings made of birds, parts of birds, of feathers or down, for hats, **boas** [*emphasis added*], collars, capes or other articles of apparel or clothing accessories."

Customs has previously classified feather boas within heading 6701, HTSUSA, see HQ 963561, dated January 24, 2002, referring to New York Ruling Letter NY A83686, dated July 3, 1996; Port Ruling Letter (PD) C83873, dated February 24, 1998; NY F80244, dated December 9, 1999; NY F82788, dated March 6, 2000; and NY F87231, dated June 15, 2000.

In HQ 963561, the importer contended that the boas were classifiable as festive articles under heading 9505, HTSUSA, on the basis that they were not apparel items, but Halloween costume accessories. The importer also claimed the boas were not the same as boas of heading 6701 because they were sold at a lower price, made of turkey feathers, lack substantial backing and when shaken, they would release dye when handled. In HQ 963561, Customs rejected the importer's arguments and stated that in general, feather boas are not contemplated by the EN to heading 9505, HTSUSA.

An article may be classified in heading 9505 if it meets the "class or kind" criteria for festive articles as provided for in *Midwest of Cannon Falls, Inc. v. United States*, 122 F.3d 1423 (Fed. Cir. 1997). In this case, the Court addressed the scope of heading 9505, specifically the class or kind of merchandise termed "festive articles," and provided new guidelines for classification of such goods in the heading. It then applied its conclusions to 29 specific articles to determine whether they were included within the scope of the class of "festive articles". In general, merchandise is classifiable as a festive article in heading 9505, when the article, as a whole:

1. Is not predominately of precious or semiprecious stones, precious metal or metal clad with precious metal;
2. Functions primarily as a decoration or functional item used in the celebration of and for entertainment on a holiday; and
3. Is associated with or used on a particular holiday.

In this instance, although the subject boa is marketed for children to be used in playing "dress-up", it fails to satisfy any of the *Midwest* criteria. We refer you to HQ 963561, which states, in pertinent part:

> Feather boas are articles of feathers. Boas come in all sizes, lengths, colors and quality. All feather boas will be used the same way, regardless of quality, as an accessory or accent article to some outfit. Whether the feather boas [sic] is accessorizing a Las Vegas show girl, a Hollywood star, a Halloween beauty queen or a little girl's dress up fantasy, it is being used the same way and should be classified uniformly.

Therefore, as the subject boa is not a festive article within heading 9505, and it is substantially similar to the boas in the aforementioned rulings, the subject boa is classifiable under subheading 6701.00.3000, HTSUSA, as an article of feathers.

For your reference, HQ 963561 is enclosed.

HOLDING:

NY C88185, dated June 5, 1998, is hereby revoked. Based on the foregoing, the feather boa is classifiable under subheading 6701.00.3000, HTSUSA, which is the provision for articles of feathers. The applicable rate of duty is 4.7 percent *ad valorem*.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

REVOCATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE CLASSIFICATION OF INSULATED FOOD OR BEVERAGE BAG/STADIUM SEAT CUSHION

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: Notice of revocation of a tariff classification ruling letter and revocation of any treatment relating to the classification of a combination insulated food or beverage bag and seat cushion.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that CBP is revoking one ruling letter relating to the tariff classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of a combination insulated food or beverage bag and seat cushion. Similarly, CBP is revoking any treatment previously accorded by it to substantially identical merchandise. Notice of the proposed revocation of the ruling letter and revocation of treatment was published in the *Customs Bulletin*, dated April 16, 2003, Vol. 37, No. 16. No comments were received.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption September 16, 2003.

FOR FURTHER INFORMATION CONTACT: Ann Segura Minardi, Textiles Branch, (202) 572–8822.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with CBP laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the CBP and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. section 1484), the importer of record is responsible for using reasonable care to enter,

classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published on April 16, 2003, in the *Customs Bulletin*, Volume 37, Number 16, proposing to revoke one ruling letter pertaining to the tariff classification of a combination utility pack/cooler bag and seat cushion. No comments were received in reply to the notice.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise, which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised the CBP during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or CBP's previous interpretation of the HTSUSA. Any person involved in substantially identical transactions should have advised CBP during this notice period. An importer's failure to advise CBP of substantially identical merchandise or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY D85922, CBP ruled that the subject goods were classifiable within subheading 9404.90.2000, HTSUSA, which provides for "Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: Other: Pillows, cushions and similar furnishings: Other." Since the issuance of that ruling, CBP has reviewed the classification of this item and has determined that the cited ruling is in error. We have determined that this item is a composite article and should be classified pursuant to a GRI 3(b) analysis with the essential character of the article imparted by the insulated food or beverage bag and not the cushion component. As such, we find that the article is properly classified in subheading 4202.92, HTSUSA, which provides *eo nomine* for insulated food or beverage bags.

Pursuant to 19 U.S.C. 1625(c)(1), CBP is revoking NY D85922 and any other ruling not specifically identified that is contrary to the de-

termination set forth in this notice to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 965893 (Attachment). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions that are contrary to the determination set forth in this notice.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

DATED: June 25, 2003

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

[Attachment]

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 965893
June 25, 2003
CLA–2 RR:CR:TE 965893 ASM
CATEGORY: Classification
TARIFF NO.: 4202.92.1000

MS. LINNEA BUCHER
CARMICHAEL INTERNATIONAL SERVICE
533 Glendale Boulevard
Los Angeles, California 90026–5097

RE: Revocation of NY D85922; The tariff classification of a combination insulated food or beverage bag/stadium seat cushion from Thailand.

DEAR MS. BUCHER:

This is in reference to New York Ruling Letter (NY) D85922, issued to you on January 6, 1999. We have reviewed this ruling and determined that the classification provided for this merchandise is incorrect. This ruling revokes NY D85922 by providing the correct classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) for an article which combines an insulated food or beverage bag and a stadium seat cushion.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057 (1993), a notice of proposed revocation was published on April 16, 2003, in the *Customs Bulletin*, Volume 37, Number 16, proposing to revoke NY D85922, dated January 6, 1999, and to revoke the tariff treatment pertaining to the tariff classification of an insulated food or beverage bag/stadium seat cushion. No comments were received.

FACTS:

The subject goods are described as a combination utility pack/cooler bag and stadium seat cushion with an outer shell made from plastic coated woven nylon. According to the description contained in NY D85922, the item folds in the middle and possesses two handles and a detachable shoulder strap secured with plastic buckles used for carrying purposes. When folded, the utility side features two "Velcro™ closing pockets, a zippered pocket and a mesh pocket for a 1 liter drink bottle. There are pockets on each side of the gusset, one with pen loops and the other with an elasticized umbrella pocket. The utility side has a zippered main compartment that is insulated

and lined with vinyl. The cushion side is comprised of a solid piece of foam and is inserted into the cover through a zippered opening. The blue stadium seat cushion measures approximately 13.5 inches x 15.5 inches when folded.

In NY D85922, Customs found that the subject goods were classified within subheading 9404.90.2000, HTSUSA, which provides for "Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: Other: Pillows, cushions and similar furnishings: Other."

ISSUE:

What is the proper classification for the merchandise?

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRI may then be applied. The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

In Headquarters Ruling Letter (HQ) 962297, dated April 5, 2002, an article identified as the "Adventure Pack" is described as a portable, soft-sided, insulated cooler bag, with a detachable stadium seat cushion. In HQ 962297, Customs determined that the "Adventure Pack" qualified as a composite good and applied a GRI 3(b) analysis. Thus, it was finally determined that the essential character of the merchandise was afforded by the insulated cooler bag and that the article was properly classified in subheading 4202.92.1000, HTSUSA, which provides for "* * *Insulated food or beverage bags: Other." As we noted in HQ 962297, pursuant to Presidential Proclamation 7515 of December 18, 2001, effective January 10, 2002, the term "insulated food or beverage bags" is now included in the text of heading 4202, HTSUSA.

In NY D85922 the subject article was also described as a combination cooler bag and stadium seat cushion with an outer shell made from plastic coated woven nylon. However, Customs erroneously classified the article pursuant to the pillow cushion or similar furnishing within subheading 9404.90.2000, HTSUSA. Thus, the basis for the revocation of NY D85922 is that HQ 962297 has set forth legal analysis which characterizes a substantially similar article as a "composite good" pursuant to a GRI 3(b) analysis and finally determined that the essential character of the article was represented by the insulated food or beverage bag component *not* the pillow/cushion component.

In view of the foregoing, it is our determination that NY D85922 incorrectly classified the combination cooler bag/stadium seat cushion. The article is a composite good and in applying a GRI 3(b) analysis we find that the essential character of the good is conveyed by the insulated food or beverage bag component which is *eo nomine* provided for in subheading 4202.92.10, HTSUSA. Finally, we are presuming that the article, which is described as having an outer shell made from plastic coated woven nylon, has an outer surface of plastic.

HOLDING:

The subject merchandise, identified in NY D85922 as a combination utility pack/cooler bag and stadium seat cushion, is correctly classified in subheading 4202.92.1000, HTSUSA, which provides for "Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags,

sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper: Other: With outer surface of sheeting of plastic or of textile materials: Insulated food or beverage bags: Other". The general column one duty rate is 3.4 percent *ad valorem*.

EFFECT ON OTHER RULINGS:

NY D85922, dated January 6, 1999, is REVOKED. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION AND MODIFICATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF SCRUB SHIRTS WITH POCKETS BELOW THE WAIST

AGENCY: Bureau of Customs and Border Protection; Department of Homeland Security.

ACTION: Notice of proposed revocation and modification of tariff classification ruling letters and revocation of treatment relating to the classification of scrub shirts with pockets below the waist.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), this notice advises interested parties that Customs and Border Protection (CBP) intends to revoke one ruling letter and modify one ruling letter, each relating to the tariff classification of scrub shirts with pockets below the waist under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). CBP also proposes to revoke any treatment previously accorded by it to substantially identical merchandise. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before August 18, 2003.

ADDRESS: Written comments are to be addressed to Customs and Border Protection, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be reviewed at Customs and Border Protection, 799 9th Street N.W., Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Kelly Herman, Textiles Branch: (202) 572–8713.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Tile VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with CBP laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the CBP and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625 (c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to revoke one ruling letter and modify one ruling letter, each pertaining to the tariff classification of scrub shirts with pockets below the waist. Although in this notice, CBP is specifically referring to the revocation of New York Ruling Letter (NY) F89127, dated July 27, 2000 (Attachment A) and to the modification of NY D80623, dated August 2, 1998 (Attachment B), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise CBP during this notice period.

Similarly, pursuant to section 625 (c)(2), Tariff Act of 1930 (19 U.S.C. 1625 (c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by CBP to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise or the importer's or CBP's previous interpretation of the HTSUSA. Any person involved in substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substan-

tially identical merchandise or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY F89127, CBP ruled that a scrub shirt was classified in subheading 6206.30.3040, HTSUSA, which provides for "Women's or girls' blouses, shirts and shirt-blouses: Of cotton: Other: Other, Other: Women's." Since the issuance of that ruling, CBP has reviewed the classification of this item and has determined that the cited ruling is in error. We have determined that the article is properly classified in subheading 6211.42.0056, HTSUSA, which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, women's or girls': Of cotton, Blouses, shirts and shirt-blouses, sleeveless tank styles and similar upper body garments, excluded from heading 6206: Other."

In NY D80623, scrub pants and four scrub shirts were classified. CBP ruled that item number 7973 was classified in subheading 6206.30.3040, HTSUSA, which provides for "Women's or girls' blouses, shirts and shirt-blouses: Of cotton: Other: Other, Other: Women's;" and that item numbers 7331 and 7356 were classified in subheading 6206.40.3030, HTSUSA, which provides for "Women's or girls' blouses, shirts and shirt blouses: Of man-made fibers: Other: Other, Other: Women's." CBP has reviewed NY D80623, and with respect to these three scrub shirts, has determined that the ruling is in error. Item number 7973 is properly classified in subheading 6211.42.0056, HTSUSA, which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, women's or girls': Of cotton, Blouses, shirts and shirt-blouses, sleeveless tank styles and similar upper body garments, excluded from heading 6206: Other." Item numbers 7331 and 7356 are classified in subheading 6211.43.0060, HTSUSA, which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, women's or girls': Of man-made fibers, Blouses, shirts and shirt-blouses, sleeveless tank styles and similar upper body garments, excluded from heading 6206."

Pursuant to 19 U.S.C. 1625(c)(1), CBP intends to revoke NY F89127, modify NY D80623 and to revoke or modify any other ruling not specifically identified, to reflect the proper classification of scrub shirts with pockets below the waist according to the analysis contained in proposed Headquarters Ruling Letters (HQ) 966393 and HQ 966546, set forth as Attachments C and D, respectively, to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

DATED: June 26, 2003

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY F89127
July 27, 2000
CLA–2–62:RR:NC:3:353 F89127
CATEGORY: Classification
TARIFF NO.: 6206.30.3040

MR. JOHN EDMONDSON
MEDSYSTEMS INTERNATIONAL
2362 James Dr.
Pittsburgh, PA 15237

RE: The tariff classification of a scrub shirt from Pakistan.

DEAR MR. EDMONDSON:

In your letter dated June 16, 2000 you requested a classification ruling.

The submitted sample is a scrub shirt described as a nurse's tunic composed of woven 55% cotton/45% polyester fabric. The unisex item has short sleeves, V neckline, two patch pockets below the waist and a slit on each side at the bottom.

The applicable scrub shirt will be 6206.30.3040, Harmonized Tariff Schedule of the United States (HTS), which provides for "Women's or girls' blouses, shirts and shirt-blouses: Of cotton: Other: Other, Women's." The duty rate will be 15.8% *ad valorem.*

The scrub shirt falls within textile category designation 341. Based upon international textile trade agreements products of Pakistan are subject to quota and the requirement of a visa.

The designated textile and apparel categories and their quota and visa status are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information, we suggest that you check, close to the time of shipment, the U.S. Customs Service Textile Status Report, an internal issuance of the U.S. Customs Service, which is available at the Customs Web site at www.customs.gov. In addition, the designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected and should also be verified at the time of shipment.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kenneth Reidlinger at 212–637–7084.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY D80623
August 2, 1998
CLA–2-62:RR:NC:3:353 D80623
CATEGORY: Classification
TARIFF NO. 6206.40.3030; 6206.30.3040; 6204.63.3510:

MR. REX TSU
GOWN INDUSTRIES, INC.
20212 Rodrigues Ave.
Cupertino, CA 95014

RE: The tariff classification of scrub shirts and pants from Indonesia.

DEAR MR. TSU:

In your letter dated July 24, 1998, you requested a tariff classification ruling.

The submitted samples are unisex scrub shirts and pants used in the health care industry. Item No. 7331 is a scrub shirt consisting of woven 65% polyester/35% cotton fabric. The garment features a key neck, side vents and two pockets at the bottom. Item No. 7973 is a scrub shirt consisting of woven 55% cotton/45% polyester fabric. The garment features a cris-cross reversible scrub shirt with one breast and lower pocket on each side, and a scissors holder in the lower pocket. Item No. 7356 is a scrub shirt consisting of woven 65% polyester/ 35% cotton fabric. The garment features a button front with slanted lower pockets, and a scissors holder in the right pocket. Item No. 78735 is a scrub shirt consisting of woven 65% polyester/45% cotton fabric. The garment features a V-neck with one breast pocket. Item No. 78834 is a pair of scrub pants consisting of woven 65% polyester/35% cotton fabric. The item is reversible with a drawstring waist and one back pocket.

The applicable subheading for the Item Nos. 7331, 7356, 78735 will be 6206.40.3030, Harmonized Tariff Schedule of the United States (HTS), which provides for "Women's or girls' blouses, shirts and shirt blouses: Of man-made fibers: Other, Other: Women's." The duty rate will be 27.9% *ad valorem*.

The applicable subheading for Item No.7973 will be 6206.30.3040, Harmonized Tariff Schedule of the United States, (HTS), which provides for "Women's or girls' blouses, shirts and shirt blouses: Of cotton: Other: Other, Women's." The duty rate will be 16% *ad valorem*.

The applicable subheading for the scrub pants, Item N0. 78834 will be 6204.63.3510, Harmonized Tariff schedule of the United States (HTS), which provides for "Women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts, divided skirts, trousers, * * *: Trousers, bib and brace overalls, breeches and shorts: Of synthetic fibers: Other: Other: Other, Trousers and breeches: Women's." The duty rate will be 29.7% *ad valorem*.

Item Nos. 7331, 7356 and 78735 fall within textile category designation 641. Item No. 7973 falls with textile category 341 and a Item No. 78834 falls within textile category 648.

The designated textile and apparel categories may be subdivided into parts.

If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral, agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the Status Report on Current Import Quotas (Restraint Levels), an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any

questions regarding the ruling, contact National Import Specialist Kenneth Reidlinger at 212–466–5881.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT C]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966393
CLA–2 RR:CR:TE 966393 KSH
TARIFF NO.: 6211.42.0056

MR. JOHN EMONDSON
MEDSUSTEMS INTERNATIONAL
2362 James Drive
Pittsburgh, PA 15237

RE: Revocation of New York Ruling Letter (NY) F89127, dated July 27, 2000; Classification of scrub type shirt; Heading 6211; Heading 6206

DEAR MR. EDMONDSON:

New York Ruling Letter (NY) F89127 was issued to you on July 27, 2000, concerning the classification, under the Harmonized Tariff Schedule of the United States (HTSUSA), of a scrub shirt. The article was classified in subheading 6206.30.3040, which provides for "Women's or girls' blouses, shirts and shirt-blouses: Of cotton: Other: Other, Other: Women's." We have reviewed that ruling and have determined that the classification provided is incorrect. Therefore, this ruling revokes NY F89127.

FACTS:

The garment at issue is a scrub shirt described as a nurse's tunic composed of woven 55 percent cotton/ 45 percent polyester fabric. The unisex item has short sleeves, a V neckline, two patch pockets below the waist and a slit on each side at the bottom.

ISSUE:

Whether the scrub shirt at issue is classifiable under Heading 6211, HTSUSA, or Heading 6206, HTSUSA.

LAW AND ANALYSIS:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Harmonized Commodity Description and Coding System Explanatory Notes (EN), constitute the official interpretation at the international level. While neither legally binding nor dispositive, the EN provide a commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings.

Heading 6206, HTSUSA, provides for women's or girls' blouses, shirts and shirt blouses. The EN to heading 6206, HTSUSA, state in pertinent part:

> This heading covers the group of women's or girls' clothing, not knitted or crocheted, which comprises blouses, shirts and shirt-blouses.
>
> This heading **does not cover** garments with pockets below the waist or with a ribbed waistband or other means of tightening at the bottom of the garment.

The garment at issue is a shirt. However, the garment has two patch pockets below the waist that preclude classification in heading 6206, HTSUSA. Consequently, the

garment is properly classifiable in heading 6211, HTSUSA, as a shirt excluded from heading 6206.

Customs has consistently classified similar merchandise in this manner. See e.g., NY I85818, dated September 20, 2002; NY G82878, dated November 15, 2000; NY G83396, dated November 7, 2000; and G83397, dated November 13, 2000.

HOLDING:

NY F89127, dated July 27, 2000, is hereby revoked. The scrub shirt is properly classifiable in subheading 6211.42.0056, HTSUSA, which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, women's or girls': Of cotton, Blouses, shirts and shirt-blouses, sleeveless tank styles and similar upper body garments, excluded from heading 6206: Other." The general column one duty rate is 8.2 percent, *ad valorem*. The textile category designation is 341.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bi-lateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest you check, close to the time of shipment, the *Textile Status Report for Absolute Quotas*, available on the CBP website at www. cbp.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local CBP office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966546
CLA–2 RR:CR:TE 966546 KSH
TARIFF NO.: 6211.42.0056; 6211.43.0060

MR. REX TSU
GOWN INDUSTRIES, INC.
20212 Rodrigues Avenue
Cupertino, CA 95014

RE: Modification of New York Ruling Letter (NY) D80623, dated August 2, 1998; Classification of scrub shirts; Heading 6211; Not Heading 6206

DEAR MR. TSU:

New York Ruling Letter (NY) D80623 was issued to you on August 2, 1998, concerning the classification, under the Harmonized Tariff Schedule of the United States (HTSUSA), of unisex scrub shirts and pants[1]. Item number 7973 was classified in subheading 6206.30.3040, which provides for "Women's or girls' blouses, shirts and shirt-blouses: Of cotton: Other: Other, Other: Women's;" and item numbers 7331 and 7356 were classified in subheading 6206.40.3030, HTSUSA, which provides for "Women's or girls' blouses, shirts and shirt-blouses: Of man-made fibers: Other: Other, Other: Women's." We have reviewed this ruling and have determined that the classification of those three garments is incorrect. Therefore, this ruling modifies NY D80623.

[1] Item number 78735 which was described as a scrub shirt with one breast pocket and Item number 78834 which were described as scrub pants were properly classified and are not the subject of this ruling.

FACTS:

In NY D80623, the garments at issue are described as unisex scrub shirts (item numbers 7331, 7356 and 7973). Item number 7331 is a scrub shirt consisting of woven 65% polyester/35% cotton fabric with a key neck, side vents and two pockets at the bottom. Item number 7356 is a scrub shirt consisting of woven 65% polyester/35% cotton fabric with a button front, slanted lower pockets and a scissors holder in the right pocket. Item number 7973 is a cris-cross reversible scrub shirt consisting of woven 55% cotton/45% polyester fabric with one breast and lower pocket on each side and a scissors holder in the lower pocket.

ISSUE:

Whether the scrub shirts at issue are classifiable under Heading 6211, HTSUSA, or Heading 6206, HTSUSA.

LAW AND ANALYSIS:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Harmonized Commodity Description and Coding System Explanatory Notes (EN), constitute the official interpretation at the international level. While neither legally binding nor dispositive, the EN provide a commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings.

Heading 6206, HTSUSA, provides for women's or girls' blouses, shirts and shirt blouses. The EN to heading 6206, HTSUSA, state in pertinent part:

> This heading covers the group of women's or girls' clothing, not knitted or crocheted, which comprises blouses, shirts and shirt-blouses.
>
> This heading **does not cover** garments with pockets below the waist or with a ribbed waistband or other means of tightening at the bottom of the garment.

The garments at issue are shirts. However, each garment has two patch pockets below the waist that preclude classification in heading 6206, HTSUSA. Consequently, the garments are properly classified in heading 6211, HTSUSA, as shirts excluded from heading 6206.

Customs has consistently classified similar merchandise in this manner. See e.g., NY I85818, dated September 20, 2002; NY G32878, dated November 15, 2000; NY G83396, dated November 7, 2000; and G83397, dated November 13, 2000.

HOLDING:

NY D80623, dated August 2, 1998, is hereby modified. The scrub shirt identified by item number 7973 is properly classified in subheading 6211.42.0056, HTSUSA, which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, women's or girls': Of cotton, Blouses, shirts and shirt-blouses, sleeveless tank styles and similar upper body garments, excluded from heading 6206: Other." Item numbers 7331 and 7356 are classified in subheading 6211.43.0060, HTSUSA, which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, women's or girls': Of man-made fibers, Blouses, shirts and shirt-blouses, sleeveless tank styles and similar upper body garments, excluded from heading 6206." The general column one duty rates are 8.2 percent and 16.1 percent, *ad valorem*, respectively. The textile category designations are 341 and 641, respectively.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bi-lateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest you check, close to the time of shipment, the *Textile Status Report for Absolute Quotas*, available on the CBP website at www.cbp.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local CBP office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF FOOTWEAR UPPERS

AGENCY: Bureau of Customs & Border Protection; Department of Homeland Security.

ACTION: Notice of proposed revocation of three tariff classification ruling letters, and the revocation of any treatment relating to the classification of footwear uppers.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182,107 Stat. 2057), this notice advises interested parties that Customs & Border Protection (CBP) intends to revoke three ruling letters relating to the tariff classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of footwear uppers. Similarly, CBP proposes to revoke any treatment previously accorded by it to substantially identical merchandise. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before August 18, 2003.

ADDRESS: Written comments are to be addressed to Customs & Border Protection, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at Customs & Border Protection, 799 9th Street, N.W., Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Joe Shankle, Penalties Branch (rotated from the Textiles Branch), at (202) 572–8824.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to revoke three ruling letters relating to the tariff classification of certain footwear uppers. Although in this notice CBP is specifically referring to the revocation of Headquarters Ruling Letter (HQ) 958056, dated August 28, 1995 (Attachment A), HQ 958966, dated March 26, 1997 (Attachment B), and New York Ruling Letter (NY) H87189, dated February 15, 2002 (Attachment C), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the three identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625 (c)(2)), as amended by section 623 of Title VI, CBP intends to revoke any treatment previously accorded by CBP to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or CBP's previous interpretation of the HTSUSA. Any person involved with substantially identical merchandise should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical merchandise or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the im-

porter or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In HQ 958056 and HQ 958966, CBP classified leather shoe uppers in subheading 6406.10.1000, HTSUSA, which provides for "Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Uppers and parts thereof, other than stiffeners: Formed uppers: Of leather or composition leather: For other persons."

In NY H87189, Customs classified an upper to be used in boots in subheading 6406.10.50, HTSUSA, which provides, in part, for: "Parts of footwear * * * and parts thereof: Uppers and parts thereof, other than stiffeners: Formed Uppers: Other: Other."

Based on our analysis of the scope of the terms of subheadings 6406.10.1000, HTSUSA, 6406.10.1050, HTSUSA, 6406.10.6000, HTSUSA and 6406.10.6500, HTSUSA, the Legal Notes, and the Explanatory Notes, the footwear uppers subject to this notice that are of rubber or plastics, are properly classified in subheading 6406.10.6000, HTSUSA, which provides for "Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Uppers and parts thereof, other than stiffeners: Other: Of rubber or plastics." Those footwear uppers that are of leather are properly classified in subheading 6406.10.6500, which provides for "Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Uppers and parts thereof, other than stiffeners: Other: Of leather."

Pursuant to 19 U.S.C. 1625(c)(1), CBP intends to revoke HQ 958056, HQ 958966, and NY H87189, and any other ruling not specifically identified that is contrary to the determination set forth in this notice to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 966539 (Attachment D), HQ 966540 (Attachment E), and HQ 966148 (Attachment F). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions that are contrary to the determination set forth in this notice. Before taking this action, consideration will be given to any written comments timely received.

DATED: June 27, 2003

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 958056
August 28, 1995
CLA–2 R::M 958065 DFC
CATEGORY: Classification
TARIFF NO.: 6406.10.10

MS. DIANE S. NICHOLS
COLE-HAAN
One Cole-Haan Drive
Yarmouth, ME 04096–1515

RE: Parts of footwear; Upper, formed; Additional U.S. Note 4 to Chapter 64; NYRL 8d,9675; HRL's 085573, 954790

DEAR MS. NICHOLS:

This is in reference to your letter dated April 24, 1995, addressed to U.S. Customs Service, Portland, Maine, concerning the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS), of three styles of leather uppers imported from India. Your inquiry concerning sample "Buffalo" and "Nubuck" has been answered by New York Ruling Letter (NYRL) 809675 dated May 25, 1995. The question of the tariff classification of the shoe upper identified as sample "woven black" has been referred to this office for a response.

FACTS:

Sample "woven black" is a leather upper created from leather strips woven and shaped on a last, which is stitched to the bottom of a grain leather "underfoot," resulting in a fully closed bottom. A full length cardboard insole is then inserted into this upper and is held to it, in the rear, by multiple tacks through the bottom of the woven leather upper and grain leather "underfoot" into the cardboard. A round hole measuring approximately 2cm in diameter (the size of a nickel) has been cut out through the leather underfoot and the cardboard insole near the front of this upper's otherwise completely closed bottom.

ISSUE:

Is the upper "unformed" for tariff purposes?

LAW AND ANALYSIS:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes, and, provided such headings or notes do not otherwise require, according to [the remaining GRI's]." In other words, classification is governed first by the terms of the headings of the tariff and any relative section or chapter notes.

If the upper is "unformed," classification would be under subheading 6406.10.65, HTSUS, which provides for parts of footwear, uppers and parts thereof, other than stiffeners, other, other, of leather. The applicable rate of duty for this provision is 3% *ad valorem* or entitled to free entry under the Generalized System of Preferences, if otherwise qualified.

If the upper is "formed," it is classifiable under subheading 6406.10.10, HTSUS, which provides for parts of footwear, uppers and parts thereof, other than stiffeners, formed uppers, of leather or composition leather, for other persons. The applicable rate of duty for this provision is 10% *ad valorem*.

Additional U.S. Note 4 to Chapter 64, HTSUS, reads as follows:

4. Provisions of subheading 6406.10 for "*formed uppers*" cover uppers, with closed bottoms, which have been shaped by lasting, molding or otherwise but not by simply closing at the bottom.

In general, "*formed uppers*" includes all items which have a layer of material between most of the foot and the ground, and which, after lacing or buckling, if needed, will stay on the foot if worn in the condition as imported and which are shaped to fit the human foot. The sample submitted has been shaped by lasting, molding or otherwise to fit the human foot. However, you contend that the existence of the hole in the underfoot and cardboard insole prevents the "woven black" from being classified as a formed upper.

In the past, Customs has taken the position that moccasin style uppers with substantial openings cut out of the bottom are unformed uppers for tariff purposes. See Headquarters Ruling Letter (HRL) 085573 dated December 28, 1989. See also HRL 954790 dated September 28, 1993, wherein it was ruled that the term "[f]ormed uppers" does not include moccasin uppers with a significant sized hole (the size of a nickel or larger) in the bottom layer whether or not the upper is fully formed (lasted) unless the piece which will cover that opening is in the same shipment.

The shaping of the woven leather strips on a last and the inserting and tacking in place of a full length cardboard insole obviously results in a permanent shaping that goes far beyond "simply closing at the bottom." However, the article does not have a completely "closed bottom" because after the upper was completed, the maker popped out a nickel sized hole through the leather underfoot and the cardboard insole. It is our position that the presence of the cardboard insole distinguishes the instant upper from those uppers lacking the cardboard insole. Consequently, due to the presence of the cardboard insole which permanently shapes the upper, we consider the upper to be "formed" even though the upper does not have a "closed bottom."

HOLDING:

The "woven black" leather upper is considered "formed" for tariff purposes.

The "woven black" leather upper is classifiable under subheading 6406.10.10, HTSU[] as parts of footwear, uppers and parts thereof, other than stiffeners, formed uppers, of leather or composition leather, for other persons.

Marvin M. Amernick for JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 958966
March 26, 1997
CLA–2 RR:TC:TE 958966 ASM
CATEGORY: Classification
Tariff No.: 6406.10.1000

MR. RUSSEL BINNING
PIONEER SHOE CORPORATION
10788 Monte Vista Ave.
Ontario, CA 91762

RE: Tariff classification of leather shoe upper for work boot; Marking of finished work boot.

DEAR MR. BINNING:

This letter concerns the request for a binding ruling regarding the tariff classification of a leather shoe upper for a work boot (style #PSC–01) under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). In addition, you request

guidance as to the proper marking of the finished product after it has received further processing in the United States.

FACTS:

It is our understanding that the subject article, a leather shoe upper, has been manufactured in China as follows: the leather upper is fully cement lasted to a cardboard insole with a 1/4 inch thick full plastic-rubber midsole and a 1/2 inch thick partial heel. The PVC mid-sole filler has a 1-1/4 inch in diameter round hole cut in the bottom. You indicate that once these uppers are imported into the United States, additional materials and processing are required to close the bottom. Specifically, a twelve step injection carousel molds a thermal plastic outsole to the upper. You further indicate that this process requires a four man team of specially trained technicians and accounts for about 65% of the cost of the finished goods.

ISSUE:

1. What is the proper tariff classification under the HTSUSA for the product identified as a leather workboot upper?

2. What is the proper marking for the finished product, identified as a work boot (style # PSC–01)?

LAW AND ANALYSIS:

Classification of merchandise under the HTSUSA, is made in accordance with the General Rules of Interpretation (GRI's) and in accordance with the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may then be applied.

If the upper is "unformed," classification would be under subheading 6406.10.6500, HTSUSA, which provides for parts of footwear, other, of leather. If the upper is "formed," it is classifiable under subheading 6406.10.1000, HTSUSA, which provides for parts of footwear with formed leather uppers. .

Additional U.S. Note 4 to Chapter 64, HTSUSA, provides:

4. Provisions of subheading 6406.10 for "formed uppers" cover uppers, with closed bottoms, which have been shaped by lasting, molding or otherwise but not by simply closing at the bottom.

It is your contention that the presence of a 1-1/4 inch diameter round hole cut in the bottom would prevent this product from being classified as a "formed upper" within the meaning of Additional U.S. Note 4 to Chapter 64, HTSUSA, because it has a substantial opening cut out of the bottom.

In Headquarters Ruling Letter (HQ) 958056, dated August 28, 1995, we stated that in general, "formed uppers" include all items which have a layer of material between most of the foot and the ground, and which after lacing or buckling, if needed, will stay on the foot if worn in the condition as imported and which are shaped to fit the human foot. The sample submitted to us in this case is an upper which has been completely shaped by lasting, molding, or otherwise to fit the human foot. Further, this upper would stay on the foot and provide ample protection to the wearer once laced.

You reference HQ 085573, dated December 28, 1989, in support of your contention that the subject boot upper has a "substantial opening" and should be considered an "unformed" upper. However, HQ 085573 can be distinguished from the present case because the uppers in that ruling had only received front-part lasting and there was no back-part lasting. In fact, HQ 085573 specifically noted that based on HQ 082075 (December 1, 1988), certain footwear uppers which were not back-part lasted and needed to be soaked, relasted and dried after importation to obtain the final shape, would not be considered formed uppers for tariff purposes. Thus, the basis for determining that the articles would be classified as unformed uppers under subheading 6406.10.6500, HTSUSA, was twofold; i.e., the sample uppers did not have closed bottoms and were not back-part lasted.

In the subject case, the leather upper has been both front and back-part lasted, and has a closed bottom sole that has been fully cement lasted to a cardboard insole. Although a 1-1/4 inch diameter round hole has been cut out of the sole, this upper has

received substantially more shaping and finishing than the footwear upper described in HQ 085573 which had neither a closed bottom sole nor back lasting.

In HQ 958056, issued August 28, 1995, it was determined that a woven black leather upper was a "formed" upper for tariff purposes. In this ruling, Customs stated that although a "nickel sized" hole had been popped out of the leather underfoot and the cardboard insole, the presence of a cardboard insole had permanently shaped this footwear upper. Thus, the upper was considered "formed" even though it did not have a "closed bottom." Such is the case with the subject boot upper which has a cardboard and rubber insole that permanently shapes the upper. Accordingly, we consider the upper to be "formed" even though the upper does not have a completely "closed bottom."

It is our understanding that all the manufacturing of this shoe will take place in China, prior to importation into the United States. Once in the U.S., a thermal plastic outsole is molded onto the shoe upper. We do not believe that this process is significant enough to have substantially transformed the good. Thus, the uppers are not excepted from marking and each upper must be marked "Made in China" at the time of importation into the U.S.

You note in your request that you would like to mark the shoes as follows: "Assembled in the U.S.A. with imported components." However, questions regarding the acceptability of such a marking on the finished shoe must be decided by the Federal Trade Commission (FTC), Division of Enforcement. The FTC has primary responsibility under statutes when a "Made in USA" claim can be made.

HOLDING:

The subject leather workboot upper (style # PSC–01), is classifiable under the subheading 6406.10.1000, HTSUSA, the provision for "Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Uppers and parts thereof, other than stiffeners: Formed uppers: Of leather or composition leather: For other persons" and is dutiable at 10% *ad valorem*.

Regarding the marking of the finished product, it is our determination that the additional processing in the United States does not substantially transform the product. Thus, each individual boot upper must be clearly marked "Made in China" on the tongue area of the boot and not on the midsole as in the sample. The marking must appear in an area where it will not be obscured by the attachment/molding of the outersole which will take place in the United States. The FTC has jurisdiction over "Made in the USA" claims and must decide whether or not such a marking is appropriate on the finished shoe. However, the "Made in China" marking must appear in close proximity to any claims regarding manufacture of the shoe in the United States.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

[ATTACHMENT C]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY H87189
February 15, 2002
CLA–2–64:RR:NC:347:H87189
CATEGORY: Classification
TARIFF NO.: 6406.10.50

MR. JIM HOFFMAN
HOFFMAN BOOTS
100 E. Riverside
Kellogg, ID 83837

RE: The tariff classification of footwear uppers

DEAR MR. HOFFMAN:

In your letter dated January 16, 2002, you requested a tariff classification ruling for a rubber footwear upper. The item submitted with your ruling request is a molded rubber boot bottom which does not cover the ankle. The item has a substantial closed rubber underfoot which will be finished in the United States by application of a rubber outer sole, heel and logging "calks." The upper will also have a laced boot shaft and lining attached in the United States. A 3/4 inch hole has been drilled in the heel area of the underfoot of the item. Due to the absence of an outer sole, the item, as imported, is not considered "unfinished footwear" classified in subheadings 6401–6405 Harmonized Tariff Schedule of the United States (HTS). The issue to be addressed here is whether the 3/4 inch opening in the underfoot negates the language of Chapter 64, (HTS) Additional U.S. Note 4, which states:

Provisions of subheading 6406.10 for "formed uppers" cover uppers, with closed bottoms, which have been shaped by lasting, molding or otherwise but not by simply closing at the bottom.

On November 17, 1993, in the Customs Bulletin, Volume 27, Number 46, Customs published Treasury Decision (T.D.) 93–88, which contains certain footwear definitions used by Customs import specialists to classify footwear. The footwear definitions were provided merely as guidelines and, although consulted here, are not to be construed as Customs rulings. With regard to "formed uppers," T.D. 93–88 states, in pertinent part:

In general, provisions for "formed uppers" include all items which have a layer of material between most of the foot and the ground, and which, after lacing or buckling, if needed will stay on the foot if worn in the condition as imported and are shaped to fit the human foot.

In the subject case, the upper is shaped to fit the foot by molding. And will stay on the foot if worn in the condition as imported. The underfoot, although a 3/4 inch diameter round hole has been cut out, is a substantial layer of material between most of the foot and the ground. The molding process producing the upper imparts substantial shaping and finishing. In this regard the upper is considered a "formed upper" for classification purposes.

The applicable subheading for this item will be 6406.10.50 (HTS), which provides for parts of footwear, uppers and parts thereof, formed uppers, other, other. The general rate of duty will be 26.2 percent *ad valorem*.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist, Richard Foley at 646–733–3042.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT D]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966539
CLA–2:RR:CR:TE JFS
CATEGORY: Classification
TARIFF NO.: 6406.10.6500

MS. DIANE S. NICHOLS
COLE-HAHN
One Cole-Hahn Drive
Yarmouth, ME 04096–1515

Re: Revocation of HQ 958056; Not Formed Uppers

DEAR MS. NICHOLS:

This is to notify you that the Bureau of Customs and Border Protection (CBP) has reconsidered Headquarters Ruling Letter (HQ) 958056, issued to you August 28, 1995, wherein CBP classified a leather shoe upper in subheading 6406.10.1000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). For the reasons that follow, this ruling revokes HQ 958056.

FACTS:

In HQ 958056, the shoe upper under consideration was described as follows:

> Sample "woven black" is a leather upper created from leather strips woven and shaped on a last, which is stitched to the bottom of a grain leather "underfoot," resulting in a fully closed bottom. A full length cardboard insole is then inserted into this upper and is held to it, in the rear, by multiple tacks throughout the bottom of the woven leather upper and grain leather "underfoot" into the cardboard. A round hole measuring approximately 2 cm in diameter (the size of a nickel) has been cut out through the leather underfoot and the cardboard insole near the front of this upper's otherwise completely closed bottom.
>
> The upper was classified in subheading 6406.10.1000, HTSUSA, which provides for "Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Uppers and parts thereof, other than stiffeners: Formed uppers: Of leather or composition leather: For other persons."

ISSUE:

Whether the fully shaped upper with a nickel-sized hole cut out of the bottom is a "formed" upper?

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

> Additional U.S. Note 4 to chapter 64, HTSUS, provides as follows:
>
> Provisions of subheading 6406.10 for *"formed uppers"* cover uppers, with closed bottoms, which have been shaped by lasting, molding or otherwise but not by simply closing at the bottom.

In HQ 958056, CBP classified the leather upper, which was stitched to an underfoot with a cardboard insole that had a nickel-sized hole in it, as a formed upper. CBP found that the lasting and the full-length cardboard insole resulted in a permanent shaping that went far beyond "simply closing at the bottom." CBP further concluded that "due to the presence of the cardboard insole which permanently shapes the up-

per, we consider the upper to be 'formed' even though the upper does not have a 'closed bottom.' "

In HQ 958966, dated March 26, 1997, CBP relied on HQ 958056 when classifying an upper that was fully shaped by cement lasting. The only issue was whether, by virtue of a 1-1/4 inch hole cut out of the mid-sole, the upper was considered to have a bottom that was not closed. CBP ruled that the upper, which was front and back lasted, and had a plastic and cardboard midsole, was a formed upper despite the a 1-1/4 inch hole in the bottom. CBP reasoned that the upper received substantially more shaping and finishing than the upper considered in HQ 958056.

HQ 958966 and HQ 958056, however, are inconsistent with a majority of our rulings on formed uppers. In HQ 561499, dated November 26, 2001, CBP ruled on the country of origin of a leather sandal manufactured by Dr. Martens™. The uppers of the sandal were shaped and attached to a completely closed plastic footbed. Although the upper was not lasted, CBP found that the upper had been sufficiently "shaped" to be considered a "formed" upper. CBP also ruled on an alternative construction process wherein the plastic footbed had a nickel-sized hole cut out of the footbed and mid-sole that would be plugged after importation. Relying upon Additional U.S. Note 4 to Chapter 64; HQ 087458, dated September 19, 1990; HQ 085573, dated December 28, 1989; and HQ 085291, dated March 1, 1990; CBP ruled that because of the hole in the footbed, the uppers did not have "closed bottoms." Thus, even though the uppers were shaped, the uppers were considered "Other" than formed. Therefore, two requirements must be met in order for an upper to be considered formed; (1) the upper material must be shaped, and (2) the bottoms must be completely closed. CBP's decision in HQ 561499, is consistent with NY F88270, dated 6/16/00, NY F86334, dated 5/4/00, NY F82881, dated 2/28/00, NY F82848, dated 2/28/00, and NY E88143, dated 11/10/99. In these rulings, CBP found that, but for the hole in each of the bottoms, the uppers would have been considered "formed."

CBP has generally held that if the bottoms of uppers had a hole cut out of them, they were not closed and the uppers were not considered to be formed uppers. See NY 887332, dated July 15, 1993 (leather upper fully lasted to cardboard insole, which is then mostly cut out ruled to be not formed); HQ 089764, dated August 15, 1991 (upper that was front lasted, but not back lasted, and had two holes in the bottom ruled to be not formed); HQ 088483, dated March 19, 1991 (unlasted upper with 3 inch long hole in bottom ruled as not being formed); HQ 085291, dated March 1, 1990 (moccasins with opening in bottoms ruled as not being formed); and HQ 085573, dated December 12, 1989 (leather uppers with opening cut out of bottoms ruled as not being formed).

In HQ 561499 (Dr. Martens™) CBP strictly interpreted Note 4(a), finding that a nickel-sized hole in the footbed and mid-sole of an otherwise formed upper causes the upper to be considered other than formed. In contrast, in HQ 958966 and HQ 958056 CBP overlooked the closed bottoms requirement because the uppers were substantially shaped and attached to a footbed. However, Note 4(a) does not specify an amount of shaping the upper must undergo before bottoms that are not closed will be disregarded. Accordingly, we follow the rationale of our ruling in HQ 561499 and find that the upper classified in HQ 958056 is not a "formed upper" because it does not have a closed bottom. Concurrent with this ruling, CBP is also revoking HQ 958966, and New York Ruling Letter H82672, dated June 25, 2001.

HOLDING:

HQ 958056, dated August 28, 1995, is hereby revoked. The subject merchandise is classified in subheading 6406.10.6500, HTSUSA, which provides, for "Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Uppers and parts thereof, other than stiffeners: Other: Of leather." The general column one duty rate is Free.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT E]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966540
CLA–2:RR:CR:TE JFS
CATEGORY: Classification
TARIFF NO.: 6406.10.6500

MR. RUSSEL BINNING
PIONEER SHOE CORP.
10788 Monte Vista Ave.
Ontario, CA 91763

Re: Revocation of HQ 958966; Not Formed Uppers

DEAR MR. BINNING:

This is to notify you that the Bureau of Customs and Border Protection (CBP) has reconsidered Headquarters Ruling Letter (HQ) 958966, issued to you March 26, 1997, wherein CBP classified a leather shoe upper for a work boot in subheading 6406.10.1000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). For the reasons that follow, this ruling revokes HQ 958966.

FACTS:

In HQ 958966, the shoe upper under consideration was described as follows:

> [T]he leather upper is fully cement lasted to a cardboard insole with a 1/4 inch thick full plastic-rubber midsole and a 1/2 inch thick partial heel. The PVC midsole filler has a 1-1/4 inch in diameter round hole cut in the bottom. You indicate that once these uppers are imported into the United States, additional materials and processing are required to close the bottom. Specifically, a twelve step injection carousel molds a thermal plastic outsole to the upper. You further indicate that this process requires a four man team of specially trained technicians and accounts for about 65% of the cost of the finished goods.

The upper was classified in subheading 6406.10.1000, HTSUSA, which provides for "Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Uppers and parts thereof, other than stiffeners: Formed uppers: Of leather or composition leather: For other persons."

ISSUE:

Whether the fully shaped upper with a 1-1/4 inch hole cut out of the bottom is a "formed" upper?

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

Additional U.S. Note 4 to chapter 64, HTSUS, provides as follows:

> Provisions of subheading 6406.10 for "*formed uppers*" cover uppers, with closed bottoms, which have been shaped by lasting, molding or otherwise but not by simply closing at the bottom.

The upper under consideration in HQ 958966 was fully shaped by cement lasting. Thus, the only issue was whether, by virtue of the 1-1/4 inch hole cut out of the midsole, the upper was considered to have a bottom that was not closed. CBP relied on HQ 958056, dated August 28, 1995, to rule that the upper, which was front and back lasted, and had a plastic and cardboard midsole, was a formed upper despite a hole in the bottom. CBP reasoned that the upper received substantially more shaping and

finishing than the upper considered in HQ 958056. In HQ 958056, CBP classified a leather upper that was stitched to an underfoot with a cardboard insole that had a nickel-sized hole in it, as a formed upper. CBP found that the lasting and the full-length cardboard insole resulted in a permanent shaping that went far beyond "simply closing at the bottom." CBP further concluded that "due to the presence of the cardboard insole which permanently shapes the upper, we consider the upper to be 'formed' even though the upper does not have a 'closed bottom.' "

HQ 958966 and HQ 958056, however, are inconsistent with a majority of our rulings on formed uppers. In HQ 561499, dated November 26, 2001, CBP ruled on the country of origin of a leather sandal manufactured by Dr. Martens™. The uppers of the sandal were shaped and attached to a completely closed plastic footbed. Although the upper was not lasted, CBP found that the upper had been sufficiently "shaped" to be considered a "formed" upper. CBP also ruled on an alternative construction process wherein the plastic footbed had a nickel-sized hole cut out of the footbed and mid-sole that would be plugged after importation. Relying upon Additional U.S. Note 4 to Chapter 64; HQ 087458, dated September 19, 1990; HQ 085573, dated December 28, 1989; and HQ 085291, dated March 1, 1990; CBP ruled that because of the hole in the footbed, the uppers did not have "closed bottoms." Thus, even though the uppers were shaped, the uppers were considered "Other" than formed. Therefore, two requirements must be met in order for an upper to be considered formed; (1) the upper material must be shaped, and (2) the bottoms must be completely closed. CBP's decision in HQ 561499, is consistent with NY F88270, dated 6/16/00, NY F86334, dated 5/4/00, NY F82881, dated 2/28/00, NY F82848, dated 2/28/00, and NY E88143, dated 11/10/99. In these rulings, CBP found that, but for the hole in each of the bottoms, the uppers would have been considered "formed."

CBP has generally held that if the bottoms of uppers had a hole cut out of them, they were not closed and the uppers were not considered to be formed uppers. See NY 887332, dated July 15, 1993 (leather upper fully lasted to cardboard insole, which is then mostly cut out ruled to be not formed); HQ 089764, dated August 15, 1991 (upper that was front lasted, but not back lasted, and had two holes in the bottom ruled to be not formed); HQ 088483, dated March 19, 1991 (unlasted upper with 3 inch long hole in bottom ruled as not being formed); HQ 085291, dated March 1, 1990 (moccasins with opening in bottoms ruled as not being formed); and HQ 085573, dated December 12, 1989 (leather uppers with opening cut out of bottoms ruled as not being formed).

In HQ 561499 (Dr. Martens™) CBP strictly interpreted Note 4(a), finding that a nickel-sized hole in the footbed and mid-sole of an otherwise formed upper causes the upper to be considered other than formed. In contrast, in HQ 958966 and HQ 958056 CBP overlooked the closed bottoms requirement because the uppers were substantially shaped and attached to a footbed. However, Note 4(a) does not specify an amount of shaping the upper must undergo before bottoms that are not closed will be disregarded. Accordingly, we follow the rationale of our ruling in HQ 561499 and find that the upper classified in HQ 958966 is not a "formed upper" because it does not have a closed bottom. Concurrent with this ruling, CBP is also revoking HQ 958056, and New York Ruling Letter H82672, dated June 25, 2001.

HOLDING:

HQ 958966, dated March 26, 1997, is hereby revoked. The subject merchandise is classified in subheading 6406.10.6500, HTSUSA, which provides, for "Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Uppers and parts thereof, other than stiffeners: Other: Of leather." The general column one duty rate is Free.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT F]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966148
CLA–2:RR:CR:TE 966148 JFS
CATEGORY: Classification
TARIFF NO.: 6406.10.6000

MR. JIM HOFFMAN
HOFFMAN BOOTS
100 E. Riverside
Kellogg, ID 83837

Re: Revocation of NY H87189; Not Formed Uppers

DEAR MR. HOFFMAN:

This is in response to your request for reconsideration of New York Ruling Letter (NY) H87189, dated February 15, 2002, wherein the Bureau of Customs and Border Protection (CBP) classified uppers to be used in the manufacture of boots in subheading 6406.10.50, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). For the reasons that follow, this ruling revokes NY H87189.

FACTS:

The article under consideration is an upper used in the construction of heavy-duty boots known as "calks" that are worn by loggers in the logging industry. The upper is fully lasted and is attached to a footbed that is composed of four layers. Attached to the footbed is a mid-sole that is composed of rubber that is 1/4 of an inch thick. A 3/4 inch diameter hole has been cut through the footbed and midsole. This hole will be plugged after the upper is imported into the United States.

On June 25, 2001, CBP issued H82672 to Tower Group International, on behalf of Hoffman Boots. The upper under consideration in that ruling was nearly identical to the instant upper, except that it did not have a hole punched out of the heel portion of the footbed and mid-sole. CBP classified that upper as a "formed upper" in subheading 6406.10.50, HTSUSA, with a duty rate of 26.2 percent *ad valorem*.

In NY H87189, the subject upper was also considered to be "formed" and was classified in subheading 6406.10.50, HTSUSA, which provides, in part, for: "Parts of footwear * * * and parts thereof: Uppers and parts thereof, other than stiffeners: Formed Uppers: Other: Other."

You contend the upper with the hole should be classified in subheading 6406.10.6000, HTSUSA, which provides, in part, for Parts of footwear * * * and parts thereof: Uppers and parts thereof, other than stiffeners: Other: Of rubber or plastics. The general column one rate of duty is Free.

ISSUE:

Whether the fully shaped upper with a nickel-sized hole cut out of the bottom is a "formed" upper.

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

Additional U.S. Note 4 to chapter 64, HTSUS, provides as follows:

> Provisions of subheading 6406.10 for "*formed uppers*" cover uppers, with closed bottoms, which have been shaped by lasting, molding or otherwise but not by simply closing at the bottom.

The instant upper has been fully shaped by lasting and molding. Thus, the only issue is whether, by virtue of the nickel-sized hole cut out of the footbed and mid-sole, the upper is considered to have a bottom which is not closed.

In NY H87189, BCP classified the subject upper as a "formed" upper, reasoning that the upper was fully shaped and that the hole in the bottom of the upper did not transform it from a formed upper into an upper that was not formed. This reasoning is consistent with two Headquarters Ruling Letters (HQ) 958966, dated March 26, 1997, and HQ 958056, dated August 28, 1995. In HQ 958966, CBP relied on HQ 958056, to rule that an upper that had been front and back lasted and that had a plastic and cardboard midsole with a 1-1/4 inch hole, was a formed upper. CBP reasoned that the upper had received substantially more shaping and finishing than the upper considered in HQ 958056. In HQ 958056, CBP classified a leather upper that was stitched to an underfoot with a cardboard insole that had a nickel-sized hole in it, as a formed upper. CBP found that the lasting and the full-length cardboard insole resulted in a permanent shaping that went far beyond "simply closing at the bottom." CBP further concluded that "due to the presence of the cardboard insole which permanently shapes the upper, we consider the upper to be 'formed' even though the upper does not have a 'closed bottom.'"

However, these two rulings are inconsistent with a majority of our rulings on formed uppers. In HQ 561499, dated November 26, 2001, CBP ruled on the country of origin of a leather sandal manufactured by Dr. Martens™. The uppers of the sandal were shaped and attached to a completely closed plastic footbed. Although the upper was not lasted, CBP found that the upper had been sufficiently "shaped" to be considered a "formed" upper. CBP also ruled on an alternative construction process wherein the plastic footbed had a nickel-sized hole cut out of the footbed and mid-sole that would be plugged after importation. Relying upon Additional U.S. Note 4 to Chapter 64; HQ 087458, dated September 19, 1990; HQ 085573, dated December 28, 1989; and HQ 085291, dated March 1, 1990; CBP ruled that because of the hole in the footbed, the uppers did not have "closed bottoms." Thus, even though the uppers were shaped, the uppers were considered "Other" than formed. Therefore, two requirements must be met in order for an upper to be considered formed; (1) the upper material must be shaped, and (2) the bottoms must be completely closed. CBP's decision in HQ 561499, is consistent with NY F88270, dated 6/16/00, NY F86334, dated 5/4/00, NY F82881, dated 2/28/00, NY F82848, dated 2/28/00, and NY E88143, dated 11/10/99. In these rulings, CBP found that, but for the hole in each of the bottoms, the uppers would have been considered "formed."

CBP has generally held that if the bottoms of uppers had a hole cut out of them, they were not closed and the uppers were not considered to be formed uppers. See NY 887332, dated July 15, 1993 (leather upper fully lasted to cardboard insole, which is then mostly cut out ruled to be not formed); HQ 089764, dated August 15, 1991 (upper that was front lasted, but not back lasted, and had two holes in the bottom ruled to be not formed); HQ 088483, dated March 19, 1991 (unlasted upper with 3 inch long hole in bottom ruled as not being formed); HQ 085291, dated March 1, 1990 (moccasins with opening in bottoms ruled as not being formed); and HQ 085573, dated December 12, 1989 (leather uppers with opening cut out of bottoms ruled as not being formed).

In HQ 561499 (Dr. Martens™) CBP strictly interpreted Note 4(a), finding that a nickel-sized hole in the footbed and mid-sole of an otherwise formed upper causes the upper to be considered other than formed. In contrast, in HQ 958966 and HQ 958056 CBP overlooked the closed bottoms requirement because the uppers were substantially shaped and attached to a footbed. However, Note 4(a) does not specify an amount of shaping the upper must undergo before bottoms that are not closed will be disregarded. Accordingly, we follow the rationale of our ruling in HQ 561499 and find that the instant upper is not a "formed upper" because it does not have a closed bottom. Concurrent with this ruling, CBP is also revoking HQ 958966 and HQ 958056.

HOLDING:

NY H87189, dated February 25, 2002, is hereby revoked. The subject merchandise is classified in subheading 6406.10.6000, HTSUSA, which provides, for "Parts of footwear (including uppers whether or not attached to soles other than outer soles); re-

movable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Uppers and parts thereof, other than stiffeners: Other: Of rubber or plastics." The general column one duty rate is Free.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION AND REVOCATIONS OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF SWIMWEAR WITH FOAM INSERTS

AGENCY: Bureau of Customs and Border Protection; Department of Homeland Security.

ACTION: Notice of proposed modification and revocations of tariff classification ruling letters and revocation of treatment relating to the classification of swimwear with foam inserts.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), this notice advises interested parties that Customs and Border Protection (CBP) intends to modify one ruling and revoke three rulings relating to tariff classification of swimwear under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). CBP also proposes to revoke any treatment previously accorded by it to substantially identical merchandise. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before August 18, 2003.

ADDRESS: Written comments are to be addressed to Customs and Border Protection, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be reviewed at Customs and Border Protection, 799 9th Street N.W., Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Kelly Herman, Textiles Branch: (202) 572–8713.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective.

Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with CBP laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the CBP and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

In New York Ruling Letter (NY) NY I87533, dated November 5, 2002, NY J81177, dated February 24, 2003, NY H89257, dated April 9, 2002, and NY I80416, dated April 19, 2002, CBP classified swimwear with foam inserts in subheading 6307.90.9889, HTSUSA, as "other made-up articles". These four rulings are set forth as attachments A through D to this document, respectively.

CBP has reviewed the classification of these articles and has determined that the cited rulings are in error. With respect to NY I87533 and NY I80416, we find that swimwear with removable inserts is properly classified in subheadings 6112.41.0020 and 6112.31.0020, HTSUSA, as "Track suits, ski-suits and swimwear, knitted or crocheted: Women's or girls' swimwear: Of synthetic fibers, Other: Girls'" and "Track suits, ski-suits and swimwear, knitted or crocheted: Men's or boys' swimwear: Of synthetic fibers: Boys'." Proposed Headquarters Ruling Letters (HQ) 966391 modifying NY I87533 and HQ 966547 revoking NY I80416, are set forth as Attachments "E" and "F" to this document.

With respect to NY J81177 and NY H89257, we find that swimwear with sewn in foam inserts is properly classified in subheadings 6113.00.9086 and 6112.31.0010, HTSUSA, which provide for "Garments made up of knitted or crocheted fabrics of heading 5903, 5906 or 5907: Other, Other: Other: Women's or girls'" and for "Track suits, ski-suits and swimwear, knitted or crocheted: Men's or boys' swimwear: Of synthetic fibers, Men's," respectively. Proposed Headquarters Ruling Letters (HQ) 966549 revoking NY J81177 and HQ 966548 revoking NY H89257 are set forth as Attachments "G" and "H" to this document.

Although CBP refers in this notice to four New York Ruling Letters, this notice covers any rulings on substantially identical merchandise that may exist, but have not been specifically identified.

CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the four identified. No further rulings have been found. Any party who has received an interpretative ruling or decision (i.e., a ruling letter, an internal advice memorandum or decision, or a protest review decision) on the merchandise subject to this notice, which is contrary to this notice, should advise CBP during the comment period. An importer's failure to advise CBP of a specific interpretative ruling or decision addressing substantially identical merchandise not identified in this notice, may raise issues of reasonable care on the part of the importer or its agent for importation of merchandise subsequent to the effective date of the final decision on this notice.

Pursuant to 19 U.S.C. 1625(c)(1), CBP intends to modify NY I87533 and revoke NY J81177, NY H89257 and NY I80416, as well as any other ruling not specifically identified, to reflect the proper classification of swimwear with foam inserts. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

DATED: June 30, 2003

Gail A. Hamill For MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY I87533
November 5, 2002
CLA–2–63:RR:NC:TA:351 I87533
CATEGORY: Classification
TARIFF NO.: 6307.90.9889

MS. DONNA L. SHIRA
SHARRETTS, PALEY, CARTER & BLAUVELT, P.C.
Seventy-five Broad Street
New York, NY 10004

RE: The tariff classification of boys' and girls' float suits and a swim vest from China.

DEAR MS. SHIRA:

In your letter dated October 22, 2002, on behalf of Authentic Fitness Corporation, you requested a tariff classification ruling. The samples are being returned as requested.

The samples submitted are a boys' float suit, style number 7530038, a girls' float suit, style number 7530040 and a swim vest, representing style numbers 757342, 757553, 757423, 7570051, and 7570052. The different style numbers for the swim vest represent different colors, patterns or different customers. The articles are used as a

swimming aid for children ages 2 to 4. The boys' and girls' float suits are one-piece suits made of 80 percent polyester/20 percent nylon stretch knit fabric. The upper torso's interior, back and front, is constructed with eight pockets with secured flaps. Contained in the pockets are removable foam inserts. Both float suits feature a partial zippered opening at the back. The enclosed paper label states: "This is not a life saving device."

The child sleeveless waist-length swim vest is constructed of 100 percent polyester stretch knit fabric designed for use by children ages 2 to 4. On the inside surface are eight pockets with secured flaps. Contained in the pockets are removable foam inserts. It features a front zipper closure. The enclosed cardboard label states: "This is not a life saving device."

The applicable subheading for the float suits and swim vest will be 6307.90.9889, Harmonized Tariff Schedule of the United States (HTS), which provides for other made up articles * * * Other. The rate of duty will be 7 percent *ad valorem*.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Mitchel Bayer at 646–733–3102.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY J81177
February 24, 2003
CLA–2–63:RR:NC:TA:351 J81177
CATEGORY: Classification
TARIFF NO.: 6307.90.9889

MS. LYNN B. STAN
EMSA
2185 City Gate Dr.
Columbus, OH 43219

RE: The tariff classification of a "Youth Neoprene Flotation Suit" from Thailand.

DEAR MS. STAN:

In your letter dated February 11, 2003, on behalf of Kent Sporting Goods Company, Inc., you requested a tariff classification ruling.

The sample submitted is a "Youth Neoprene Flotation Suit." It is a one-piece sleeveless bodysuit-style item made of neoprene rubber covered on both sides with knit fabric. It has leg openings but no leg coverage. Sewn into the upper torso area, front and back, is a PVC foam panel. It features a front zipper closure. It appears to be designed to assist a child while swimming.

You state your belief that the correct classification for this item is subheading 6307.20.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for other made up articles, lifejackets and lifebelts. The U.S. Coast Guard standard for life preservers (46 CFR 160.055) states the following:

This specification covers life preservers which essentially consist of plastic foam buoyant material arranged and distributed so as to provide the flotation characteristics and buoyancy required to hold the wearer in an upright or slightly backward position with head and face clear of the water.

The Youth Neoprene Floatation Suit is described in your letter as a floatation swim vest, which we take to mean a floatation aid, a device to assist children learning to swim. While it provides buoyancy, its main function is not that of a life jacket, that is, to save a life, but rather to allow a child to play and swim.

The applicable subheading for the "Youth Neoprene Flotation Suit" will be 6307.90.9889, HTS, which provides for other made up articles * * * Other. The rate of duty will be 7 percent *ad valorem*.

Articles classifiable under subheading 6307.90.9889, HTS, which are products of Thailand, are currently entitled to duty free treatment under the Generalized System of Preferences (GSP) upon compliance with all applicable regulations. The GSP, however, is subject to modification and periodic suspension, which may affect the status of your transaction at the time of entry for consumption or withdrawal from warehouse. To obtain current information on GSP, check the Customs Web site at www.customs.gov. At the Web site, click on "CEBB" and then search for the term "GSP".

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Mitchel Bayer at 646–733–3102.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT C]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY H89257
April 9, 2002
CLA–2–63:RR:NC:N3:351 H89257
CATEGORY: Classification
TARIFF NO.: 6307.90.9889

MR. CARLOS CARRANCO
CARRANCO & POU, LLC
21424 SW 87 Place
Miami, FL 33189

RE: The tariff classification of floatation pants from China, Korea, Mexico, or China.

DEAR MR. CARRANCO:

In your letter dated March 14, 2002, you requested a ruling on tariff classification.

You submitted a sample of the Dr. Gravity.net. It has the appearance of a pair of shorts or bathing trunks, with an elasticized waist and drawstring. However there are 12 foam pads sewn into the shorts. Your letter states that the shorts are made to be worn over a regular swim suit since it has no interior mesh liner. The bulky padding make it impractical to be worn other than for swimming. You state that the purpose is to allow a swimmer to gain confidence while learning to swim.

In your letter you suggest that the correct classification is subheading 6211.33.0061, Harmonized Tariff Schedule of the United States (HTS), which provides for track suits, ski-suits and swimwear; other garments: men's or boys': other. However, items are not considered wearing apparel when the use of those items goes far beyond that of general wearing apparel. While there are similarities between the Dr. Gravity and a pair of shorts or a standard men's swimsuit, it is exclusively used in very specific situations. The difference in use and effect between this article and conventional shorts or swimsuits is so large that we must conclude that the Dr. Gravity.net is no longer wearing apparel.

The applicable subheading for this product will be 6307.90.9889, HTS, which provides for other made up textile articles: other. The general rate of duty will be seven percent *ad valorem*.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R.177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Mitchel Bayer at 646–733–3102.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT D]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY I80416
April 19, 2002
CLA–2–63:RR:NC:TA:351 I80416
CATEGORY: Classification
TARIFF NO.: 6307.90.9989

MS. CHERYL SANTOS
CVS/PHARMACY
One CVS Drive
Woonsocket, RI 02895

RE:

The tariff classification of a "Swim Training Suit" from China,

DEAR MS. SANTOS:

In your letter dated April 9, 2002, you requested a tariff classification ruling. The sample is being returned as requested.

The sample submitted is a "Swim Training Suit," item number 181977 used as a swimming aid for children ages 3 to 6. It is a one-piece unisex suit. It is made of stretch knit polyester fabric designed with flotation foam sewn into the back, front and neck area. The "Swim Training Suit" is described in the literature as an aid for pre-swimmers, a device to assist children learning to swim. While it provides buoyancy, its main function is not that of a life jacket, that is, to save a life, but rather to allow a child to play and swim. In addition, the garment has a label which states "Not a Life Preserver."

The applicable subheading for the "Swim Training Suit" will be 6307.90.9889, Harmonized Tariff Schedule of the United States (HTS), which provides for other made up articles * * * Other. The rate of duty will be 7 percent *ad valorem*.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Mitchel Bayer at 646–733–3102.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT E]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966391
CLA–2 RR:CR:TE 966391 KSH
TARIFF NO.: 6112.41.0020, 6112.31.0020

DONNA L. SHIRA, ESQ.
SHARRETS, PALEY, CARTER & BLAUVELT, P.C.
Seventy-five Broad Street
New York, NY 10004

RE: Modification of New York Ruling Letter (NY) I87533, dated November 5, 2002; Classification of girls' and boys' Float Suits

DEAR MS. SHIRA:

This letter is to inform you that the Bureau of Customs and Border Protection (CBP) has reconsidered New York Ruling Letter (NY) I87533, issued to you on November 5, 2002, on behalf of your client Authentic Fitness Corporation, concerning, in part, the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of two articles worn by boys and girls and identified as a float suit.[1] The articles were classified in subheading 6307.90.9889, which provides for "Other made up articles, including dress patterns: Other: Other: Other, Other: Other." We have reviewed that ruling and, with respect to the float suits, found it to be in error. Therefore, this ruling modifies NY I87533 as it pertains to the classification of the float suits.

FACTS:

The merchandise at issue consists of a boys' float suit, style number 7530038 and a girls' float suit, style number 7530040. The boys' and girls' float suits are one piece full body suits made of 80 percent polyester/20 percent nylon stretch knit fabric. The upper torso's interior, back, and front is constructed with eight pockets with secured flaps. Removable foam inserts are contained in the pockets. With these in place, the articles are used as a swimming aid for children ages 2–4. The articles feature a partial zippered opening at the back. The enclosed paper label states: "This is not a life saving device."

ISSUE:

Are the textile articles at issue classifiable as swimsuits or as other made up articles.

LAW AND ANALYSIS:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Harmonized Commodity Description and Coding System Explanatory Notes (EN), constitute the official interpretation at the international level. While neither legally binding nor dispositive, the EN provide a commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings.

Chapter 61 covers certain articles of apparel that are knitted or crocheted. Heading 6112, HTSUSA, provides for track suits, ski-suits and swimwear, knitted or crocheted. In order for the article to be classified in Chapter 61, HTSUSA, the article must be considered wearing apparel. Heading 6307, HTSUSA, provides for other made up textile articles not more specifically provided for elsewhere in the tariff schedule. To be classified under Heading 6307, HTSUSA, the article must be considered "of textiles",

[1] NY I87533 also classified a swim vest. That classification is not in issue for purposes of this modification.

"made up", within the meaning of Note 7, Section XI, and must not be more specifically classifiable as a garment of Chapter 61.

It is your position that, "the instant float suits cannot be classified as garments because their primary use is as flotation devices and they cannot be used in the same manner as traditional swimsuits." You argue that the float suits' inserts are not intended to be removed other than for cleaning or replacement and to do otherwise would cause the articles to be unusable due to gaping and general discomfort.

In *Arnold v. United States*, 147 U.S. 494, 496 (1892), the Supreme Court defined "wearing apparel" as "not an uncommon one in statutes, and * * * used in an inclusive sense as embracing all articles which are ordinarily worn—dress in general." In *Antonia Pompeo v. United States*, 40 Cust. Ct. 362, 365, C.D. 2006 (1958), it was held that the term wearing apparel includes articles worn by human beings for reasons of decency, comfort or adornment, but does not include articles worn as a protection against the hazards of a game, sport or occupation. And, in *Jack Bryan, Inc. v. United States*, 72 Cust. Ct. 197, 204, C.D. 4541 (1974) the Court stated that the term wearing apparel is generic or descriptive and that under prior tariff acts it was held to mean all articles of wearing apparel worn by human beings for reasons of decency, comfort and adornment.

However, whether an article is to be considered wearing apparel depends on its use. See *Admiral Craft Equipment Corp. v. United States*, 82 Cust. Ct. 162, 164, C.D. 4796 (1979). In *Daw Industries, Inc. v. United States*, 1 Fed. Cir. 146, 150 (1983), the Court of Appeals for the Federal Circuit further elaborated that virtually all wearing apparel is to a degree (often a high degree) designed and worn to provide comfort and protection, often for very specific situations. The pivotal issue is whether the incremental difference in the article to be used in a specific situation has become so large that the article is no longer wearing apparel.

The packaging for the float suit states that it is a great tool for helping teach young swimmers, allows children to move their arms and legs freely, builds water confidence and provides UV protection. The float suits provide protection from the elements, protect the decency of the wearer and may even be said to adorn the body. While the float suits may provide some buoyancy and be used as a swimming aid the additional protection and other features of the float suit are not significantly more or essentially different than a swimsuit alone. Thus, we conclude that the float suits are wearing apparel.

HOLDING:

NY I87533, dated November 5, 2002, is hereby modified.

The float suits are properly classified in subheading 6112.41.0020 and 6112.31.0020, HTSUSA, which provide, respectively, for "Track suits, ski-suits and swimwear, knitted or crocheted: Women's or girls' swimwear: Of synthetic fibers, Other: Girls'" and "Track suits, ski-suits and swimwear, knitted or crocheted: Men's or boys' swimwear: Of synthetic fibers: Boys'." The general column one duty rates are 25.1 percent and 26.1 percent, *ad valorem*, respectively. The textile category is 659.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bi-lateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest your client check, close to the time of shipment, the *Textile Status Report for Absolute Quotas*, an issuance of CBP which is available on the CBP website at www.CBP.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, your client should contact the local CBP office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT F]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966547
CLA–2 RR:CR:TE 966547 KSH
TARIFF NO.: 6112.41.0020

MS. CHERYL SANTOS
CVS/PHARMACY
One CVS Drive
Woonsocket, RI 02895

RE: Revocation of New York Ruling Letter (NY) I80416, dated April 19, 2002; Classification of children's swim training suit.

DEAR MS. SANTOS:

This letter is to inform you that the Bureau of Customs and Border Protection (CBP) has reconsidered New York Ruling Letter (NY) I80416, issued to you on April 19, 2002, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of a "Swim Training Suit," item number 181977. The article was classified in subheading 6307.90.9889, HTSUSA, which provides for "Other made up articles, including dress patterns: Other: Other: Other, Other: Other." We have reviewed that ruling and found it to be in error. Therefore, this ruling revokes NY I80416.

FACTS:

The Swim Training Suit is described as a one-piece unisex suit style made of stretch knit polyester fabric with flotation foam sewn into the back, front, and neck area. It is said to be designed as a swimming aid for children ages 3–6.

ISSUE:

Whether the Swim Training Suit is classifiable as a swimsuit or as an other made up article.

LAW AND ANALYSIS:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Harmonized Commodity Description and Coding System Explanatory Notes (EN), constitute the official interpretation at the international level. While neither legally binding nor dispositive, the EN provide a commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings.

Chapter 61 covers certain articles of apparel that are knitted or crocheted. Heading 6113, HTSUSA, provides for garments, made up of knitted or crocheted fabrics of heading 5903, 5906, or 5907. In order for the article to be classified in Chapter 61, HTSUSA, the article must be considered wearing apparel. Heading 6307, HTSUSA, provides for other made up textile articles not more specifically provided for elsewhere in the tariff schedule. To be classified under Heading 6307, HTSUSA, the article must be considered "of textiles", "made up", within the meaning of Note 7, Section XI, and must not be more specifically classifiable as a garment of Chapter 61.

In *Arnold v. United States*, 147 U.S. 494, 496 (1892), the Supreme Court defined "wearing apparel" as "not an uncommon one in statutes, and * * * used in an inclusive sense as embracing all articles which are ordinarily worn—dress in general." In *Antonia Pompeo v. United States*, 40 Cust. Ct. 362, 365, C.D. 2006 (1958), it was held that the term wearing apparel includes articles worn by human beings for reasons of decency, comfort or adornment, but does not include articles worn as a protection against the hazards of a game, sport or occupation. In *Jack Bryan, Inc. v. United States*, 72 Cust. Ct. 197, 204, C.D. 4541 (1974), the Court stated that the term wearing apparel is generic or descriptive and that under prior tariff acts it was held to

mean all articles of wearing apparel worn by human beings for reasons of decency, comfort and adornment.

However, whether an article is to be considered wearing apparel depends on its use. See *Admiral Craft Equipment Corp. v. United States*, 82 Cust. Ct. 162, 164, C.D. 4796 (1979). In *Daw Industries, Inc. v. United States*, 1 Fed. Cir. 146, 150 (1983), the Court of Appeals for the Federal Circuit further elaborated that virtually all wearing apparel is to a degree (often a high degree) designed and worn to provide comfort and protection, often for very specific situations. The pivotal issue is whether the incremental difference in the article to be used in a specific situation has become so large that the article is no longer wearing apparel.

The swim training suit allows children to move their arms and legs freely and builds water confidence while the child plays and swims. While the suit provides some buoyancy to aid swimming, the additional protection and other features of the suit are not significantly more or essentially different than a swimsuit alone. Thus, we conclude that the swim training suit is wearing apparel.

HOLDING:

NY I80416, dated April 19, 2002, is hereby revoked.

The swim training suit is properly classified in subheading 6112.41.0020, HTSUSA, which provides for "Track suits, ski-suits and swimwear, knitted or crocheted: Women's or girls' swimwear: Of synthetic fibers, Other: Girls'." The general column one duty rate is 25.1 percent, *ad valorem*. The textile category is 659.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bi-lateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest you check, close to the time of shipment, the *Textile Status Report for Absolute Quotas*, an issuance of CBP which is available on the CBP website at www.CBP.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local CBP office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT G]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966549
CLA–2 RR:CR:TE 966549 KSH
TARIFF NO.: 6113.00.9086

MS. LYNN B. STAN
EMSA
2185 City Gate Dr.
Columbus, Ohio 43219

RE: Revocation of New York Ruling Letter (NY) J81177, dated February 24, 2003; Classification of Youth Neoprene Floatation Suit

DEAR MS. STAN:

This letter is to inform you that the Bureau of Customs and Border Protection (CBP) has reconsidered New York Ruling Letter (NY) J81177, issued to you on February 24, 2003, on behalf of your client Kent Sporting Goods Company, Inc., concerning the classification under the Harmonized Tariff Schedule of the United States Anno-

tated (HTSUSA) of a "Youth Neoprene Flotation Suit." The article was classified in subheading 6307.90.9889, HTSUSA, which provides for "Other made up articles, including dress patterns: Other: Other: Other, Other: Other." We have reviewed that ruling and found it to be in error. Therefore, this ruling revokes NY J81177.

FACTS:

The Youth Neoprene Flotation Suit is described as a one-piece sleeveless body-suit style made of neoprene rubber covered on both sides with knit fabric. It has leg openings but no leg coverage. A PVC foam panel is sewn into the upper torso area, front and back. The suit features a front zipper closure and appears to be designed to provide buoyancy and assist a child while swimming.

ISSUE:

Whether the Youth Neoprene Flotation Suit is classifiable as a swimsuit or as an other made up article.

LAW AND ANALYSIS:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Harmonized Commodity Description and Coding System Explanatory Notes (EN), constitute the official interpretation at the international level. While neither legally binding nor dispositive, the EN provide a commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings.

Chapter 61 covers certain articles of apparel that are knitted or crocheted. Heading 6113, HTSUSA, provides for garments, made up of knitted or crocheted fabrics of heading 5903, 5906, or 5907. In order for the article to be classified in Chapter 61, HTSUSA, the article must be considered wearing apparel. Heading 6307, HTSUSA, provides for other made up textile articles not more specifically provided for elsewhere in the tariff schedule. To be classified under Heading 6307, HTSUSA, the article must be considered "of textiles", "made up", within the meaning of Note 7, Section XI, and must not be more specifically classifiable as a garment of Chapter 61.

In *Arnold v. United States*, 147 U.S. 494, 496 (1892), the Supreme Court defined "wearing apparel" as "not an uncommon one in statutes, and * * * used in an inclusive sense as embracing all articles which are ordinarily worn—dress in general." In *Antonia Pompeo v. United States*, 40 Cust. Ct. 362, 365, C.D. 2006 (1958), it was held that the term wearing apparel includes articles worn by human beings for reasons of decency, comfort or adornment, but does not include articles worn as a protection against the hazards of a game, sport or occupation. In *Jack Bryan, Inc. v. United States*, 72 Cust. Ct. 197, 204, C.D. 4541 (1974), the Court stated that the term wearing apparel is generic or descriptive and that under prior tariff acts it was held to mean all articles of wearing apparel worn by human beings for reasons of decency, comfort and adornment.

However, whether an article is to be considered wearing apparel depends on its use. See *Admiral Craft Equipment Corp. v. United States*, 82 Cust. Ct. 162, 164, C.D. 4796 (1979). In *Daw Industries, Inc. v. United States*, 1 Fed. Cir. 146, 150 (1983), the Court of Appeals for the Federal Circuit further elaborated that virtually all wearing apparel is to a degree (often a high degree) designed and worn to provide comfort and protection, often for very specific situations. The pivotal issue is whether the incremental difference in the article to be used in a specific situation has become so large that the article is no longer wearing apparel.

The flotation suit allows children to move their arms and legs freely and builds water confidence while they play and swim. While the flotation suit provides some buoyancy to aid in swimming, the additional protection and other features of the flotation suit are not significantly more or essentially different than a swimsuit alone. Thus, we conclude that the flotation suit is wearing apparel.

HOLDING:

NY J81177, dated February 24, 2003, is hereby revoked.

The "youth neoprene flotation suit" is properly classified in subheading 6113.00.9086, HTSUSA, the provision for "Garments, made up of knitted or crocheted fabrics of heading 5903, 5906, or 5907: Other, Other: Other: Women's or girls'." The general column one duty rate is 7.2 percent, *ad valorem*. The designated textile category code is 659.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bi-lateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest your client check, close to the time of shipment, the *Textile Status Report for Absolute Quotas*, an issuance of CBP which is available on the CBP website at www.CBP.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, your client should contact the local CBP office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT H]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966548
CLA–2 RR:CR:TE 966548 KSH
TARIFF NO.: 6112.31.0010

MR. CARLOS CARRANCO
CARRANCO & POU, LLC
21424 SW 87 Place
Miami, FL 33189

RE: Revocation of New York Ruling Letter (NY) H89257, dated April 9, 2002; Classification of men's bathing trunks.

DEAR MR. CARRANCO:

This letter is to inform you that the Bureau of Customs and Border Protection (CBP) has reconsidered New York Ruling Letter (NY) H89257, issued to you on April 9, 2002, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of the "Dr. Gravity.net" bathing trunks. The article was classified in subheading 6307.90.9889, HTSUSA, which provides for "Other made up articles, including dress patterns: Other: Other: Other, Other: Other." We have reviewed that ruling and found it to be in error. Therefore, this ruling revokes NY H89257.

FACTS:

The garment at issue is described as a pair of shorts or bathing trunks, with an elasticized waist and drawstring with 12 foam pads sewn into the shorts. The shorts are designed to be worn over a regular swim suit for the user to gain confidence while learning to swim.

ISSUE:

Whether the article is classifiable as a swimsuit or as an other made up article.

LAW AND ANALYSIS:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Harmonized Commodity Description and Coding System Explanatory Notes (EN), constitute the official interpretation at the international level. While neither legally binding nor dispositive, the EN provide a commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings.

Chapter 61 covers certain articles of apparel that are knitted or crocheted. Heading 6112, HTSUSA, provides for for track suits, ski-suits and swimwear, knitted or crocheted garments, made up of knitted or crocheted fabrics of heading 5903, 5906, or 5907. In order for the article to be classified in Chapter 61, HTSUSA, the article must be considered wearing apparel. Heading 6307, HTSUSA, provides for other made up textile articles not more specifically provided for elsewhere in the tariff schedule. To be classified under Heading 6307, HTSUSA, the article must be considered "of textiles", "made up", within the meaning of Note 7, Section XI, and must not be more specifically classifiable as a garment of Chapter 61.

In *Arnold v. United States*, 147 U.S. 494, 496 (1892), the Supreme Court defined "wearing apparel" as "not an uncommon one in statutes, and * * * used in an inclusive sense as embracing all articles which are ordinarily worn—dress in general." In *Antonia Pompeo v. United States*, 40 Cust. Ct. 362, 365, C.D. 2006 (1958), it was held that the term wearing apparel includes articles worn by human beings for reasons of decency, comfort or adornment, but does not include articles worn as a protection against the hazards of a game, sport or occupation. In *Jack Bryan, Inc. v. United States*, 72 Cust. Ct. 197, 204, C.D. 4541 (1974), the Court stated that the term wearing apparel is generic or descriptive and that under prior tariff acts it was held to mean all articles of wearing apparel worn by human beings for reasons of decency, comfort and adornment.

However, whether an article is to be considered wearing apparel depends on its use. See *Admiral Craft Equipment Corp. v. United States*, 82 Cust. Ct. 162, 164, C.D. 4796 (1979). In *Daw Industries, Inc. v. United States*, 1 Fed. Cir. 146, 150 (1983), the Court of Appeals for the Federal Circuit further elaborated that virtually all wearing apparel is to a degree (often a high degree) designed and worn to provide comfort and protection, often for very specific situations. The pivotal issue is whether the incremental difference in the article to be used in a specific situation has become so large that the article is no longer wearing apparel.

The item allows the user to build confidence as he learns to swim. While the item provides some buoyancy to aid in swimming, the additional protection and other features of the trunks are not significantly more or essentially different than a swimsuit alone. Thus, we conclude that the item is wearing apparel.

HOLDING:

NY H89257, dated April 9, 2003, is hereby revoked.

The item at issue, identified as the "Dr. Gravity.net" bathing trunks, are properly classified in subheading 6112.31.0010, HTSUSA, as "Track suits, ski-suits and swimwear, knitted or crocheted: Men's or boys' swimwear: Of synthetic fibers, Men's." The general column one duty rate is 26.1 percent, *ad valorem*. The textile category is 659.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bi-lateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest you check, close to the time of shipment, the *Textile Status Report for Absolute Quotas*, an issuance of CBP which is available on the CBP website at www.CBP.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local CBP office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza
New York, NY 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton
Timothy C. Stanceu

Senior Judges

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

Decisions of the United States Court of International Trade

(Slip Op. 03–67)

VANETTA U.S.A. INCORPORATED, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 97–01–00117

[Cross-motions for summary judgment as to classification of animal-feed additives denied.]

Dated: June 25, 2003

Barnes, Richardson & Colburn (James S. O'Kelly) for the plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General; *John J. Mahon*, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Bruce N. Stratvert*); and Office of Assistant Chief Counsel, International Trade Litigation, U.S. Bureau of Customs and Border Protection (*Joseph M. Spraragen*), of counsel, for the defendant.

MEMORANDUM & ORDER

AQUILINO, *Judge*: The parties have interposed cross-motions for summary judgment in this consolidated action, which contests U.S. Customs Service classification of certain additives imported from Italy for animal feeds. While this court's careful, albeit belated, review of these motions does not lead it to conclude that such judgment can be entered, they do substantiate, yet again, the accumulated wisdom encompassed by USCIT Rule 56(d) that such motions aid in

> ascertain[ing] what material facts exist without substantial controversy and what material facts are actually and in good faith controverted[,]

thereby streamlining preparation for and conduct of the trial on the remaining material issue(s) of fact.

I

Subsequent to the filing of plaintiff's motion for summary judgment, the defendant chose to respond with such a motion of its own. This form of response has precipitated a formal motion to strike by the plaintiff, which takes the position that defendant's cross-motion "was not timely filed in accordance with the scheduling order in this case."

That order of the court issued pursuant to USCIT Rules 1 and 16 set a date certain for submission of any dispositive motions. The plaintiff met the deadline, whereas the defendant twice moved for, and obtained, formal extensions of time "to respond to plaintiff's motion for summary judgment". Whereupon the plaintiff presses that "[i]n neither instance did defendant seek a modification of the scheduling order or request more time to file its own motion for summary judgment." Plaintiff's Motion to Strike Defendant's Motion for Summary Judgment, p. 2.

The precision of this motion to strike is unimpeachable, but, when faced with a similar challenge by the plaintiff in *Rollerblade, Inc. v. United States*, 24 CIT 812, 116 F.Supp.2d 1247 (2000), *aff'd*, 282 F.3d 1349 (Fed.Cir. 2002), the court determined to accept "as such" the defendant's cross-motion for summary judgment on the ground that the

> practice of combining the cross-motion for summary judgment with the party's response to the original motion for summary judgment is an efficient use of court resources.

24 CIT at 813 and 116 F.Supp.2d at 1250, n. 1. Since the motion to strike at bar does not show any prejudice to the plaintiff as a result of the nature of defendant's chosen response, this court discerns no basis for deviation from the determination in *Rollerblade*. Indeed, all parties are at liberty to posit motions for summary judgment whenever, in the exercise of sound analysis, they come to conclude "that there is no genuine issue as to any material fact and that the[y are] entitled to a judgment as a matter of law." USCIT Rule 56(c). Moreover, it has long been the mandate in an action like this that the court reach "the correct result[ ] by whatever procedure is best suited to the case at hand." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878, *reh'g denied*, 739 F.2d 628 (Fed.Cir. 1984) (emphasis in original). Here, that procedure may well include cross-motions for summary judgment.

II

The court's jurisdiction to hear and decide this matter is pursuant to 28 U.S.C. §§ 1581(a), 2631(a). *Cf.* Defendant's Reply Brief in Support of Motion for Summary Judgment and in Opposition to Plain-

tiff's Response, p. 2, n. 3 ("the Government withdraws its jurisdictional objections previously advanced").

As required by Rule 56, plaintiff's motion for summary judgment is accompanied by a statement of the material facts as to which it contends there is no genuine issue to be tried. Included therein are the following averments:

4. The imported merchandise consists of Menadione Sodium Bisulfite (hereinafter "MSB"), Menodione Sodium Bisulfite Complex (hereinafter "MSBC"), Menadione Dimethylpyrimidinol Bisulfite (herein after "MPB") and Menadione Nicotinamide Bilsulfite (hereinafter "MNB")* * * *

5. The chemical structure of naturally occurring Vitamin K_1 phylloquinone is 2-methyl-3-phytyl-1, 4-naphthoquinone* * * *

6. The chemical structure of naturally occurring Vitamin K_2 menaquinone is 2-methyl-3-all-trans-polyprenyl-1, 4-naphthoquinone* * * *

7. Vitamin K_1 and vitamin K_2 are vitamins for purposes of the HTSUS and are classified under heading 2936, HTSUS* * * *

* * * * * * *

11. When MSB, MSBC, MPB or MNB is ingested, the menadione in these products is converted into a form of vitamin K_2, specifically vitamin $K_{2(20)}$* * * *

12. The principal use of the imported products is as a component in animal feeds* * * *

13. Customs excluded the imported products from classification under heading 2936 because, as interpreted by Customs, this heading does not include "synthetic substitutes for vitamins" * * * *

14. The phrase "synthetic substitute for a vitamin" does not appear anywhere in the HTSUS statute enacted by Congress* * * *

15. Defendant defines "synthetic substitute for a vitamin" as "a synthesized chemical compound that is not found in nature but has vitamin activity. This differs from a synthetically reproduced vitamin whose structure is found in nature but has been synthesized from other chemicals." * * * *

* * * * * * *

17. The imported MSB was classified by Customs as "Ketones and quinones, whether or not with other oxygen function, and their halogenated, sulfonated, nitrated or nitrosated

derivatives: * * * Halogenated, sulfonated, nitrated or nitrosated derivatives: Aromatic: * * * Other", under subheading 2914.70.20, HTSUS, dutiable at 11% *ad valorem* * * * *

18. The imported MSB has the same menadione moiety (2-methyl-1, 4-naphthoquinone) as naturally occurring Vitamin K_1 phylloquinone and naturally occurring Vitamin K_2 menaquinone* * * *

19. The SB or sodium bisulfite portion of MSB is excreted by the body after ingestion* * * *

20. From a nutritional perspective, the menadione (2-methyl-1, 4-naphthoquinone) moiety is the most important component of MSB* * * *

* * * * * * *

21. The imported MSBC was [also] classified by Customs * * * under subheading 2914.70.20, HTSUS, [*supra*, para. 17,] dutiable at 11% *ad valorem** * * *

22. The imported MSBC has the same menadione moiety (2-methyl-1, 4-naphthoquinone) as naturally occurring Vitamin K_1 phylloquinone and naturally occurring Vitamin K_2 menaquinone* * * *

23. MSBC is essentially MSB with additional sodium bisulfite added for increased stability* * * *

24. The SBC or sodium bisulfite complex portion of MSBC is excreted by the body after ingestion* * * *

25. From a nutritional perspective, the menadione (2-methyl-1, 4-naphthoquinone) moiety is the most important component of MSBC* * * *

* * * * * * *

27. The chemical structure of MPB is 2-methyl-1, 4-naphthoquinone 2-hydroxy-4, 6-dimethylpyrimidine bisulfite* * * *

28. The imported MPB has the same menadione moiety (2-methyl-1, 4-naphthoquinone) as naturally occurring Vitamin K_1 phylloquinone and naturally occurring Vitamin K_2 menaquinone* * * *

29. The PB portion of MPB is excreted by the body after ingestion and has no nutritional value* * * *

30. From a nutritional perspective, the menadione (2-methyl-1,

4-naphthoquinone) moiety is the most important component of MPB* * * *

* * * * * * *

32. Nicotinamide is also known as niacinamide* * * *

33. Niacinamide is a vitamin described in heading 2936, HTSUS* * * *

34. The bisulfite portion of MNB is excreted by the body after ingestion* * * *

35. The nicotinamide portion is not excreted by the body after ingestion and provides niacin or niacinamide activity * * * *

36. The nicotinamide portion of MNB is a vitamin, as described in subheading 2936.29.1530, HTSUS* * * *

* * * * * * *

38. Defendant is unaware of any uses of MNB as a component of animal feeds other than as a source of vitamin K activity and niacin* * * * [1]

The defendant admits without any reservation all but one of these averments. *See* Defendant's Response to Plaintiff's Statement of Material Facts as to Which There is No Genuine Dispute, pp. 1–4. As for that single, enumerated paragraph, 4, *supra*, the defendant admits it with regard to MSB and MSBC but

> [a]vers that none of the imported merchandise is described on the commercial invoices as MNB, or MPB, or their equivalents.

Id. at 1, para. 4. As for defendant's own statement of material facts in support of its cross-motion, the plaintiff admits the following averments contained therein:

2. MSB, MNB and MSBC are aromatic derivatives of quinones.

3. MPB is an aromatic heterocyclic compound containing a pyrimidine ring.

* * * * * * *

5. Menadione is not the natural precursor of vitamins K_1[ ] in plants and K_2 in bacteria.

6. The Menadione found in nature is not a provitamin of Phylloquinone.[2]

---

[1] Plaintiff's Rule 56(i) Statement of Material Facts as to Which No Genuine Dispute Exists (citations in support of each averment omitted).

In sum, there is agreement between the parties with regard to many of the salient facts. Hence, the plaintiff also agrees that HTSUS chapter 29 (1994)

> contemplates that some organic chemical products may be described in more than one of its headings. MSB, MSBC, MPB and MNB are examples of four such products.

Plaintiff's Memorandum, p. 12. This means that MSB, MNB and MSBC are at least arguably covered by HTSUS subheading 2914.70.20 and MPB by subheading 2933.59.70, as now posited by the defendant.

Be such concurrence as it may, a court

> first construes the language of the heading, and any section or chapter notes in question, to determine whether the product at issue is classifiable under the heading. Only after determining that a product is classifiable under the heading should the court look to the subheadings to find the correct classification for the merchandise. *See* GRI 1, 6. Furthermore, when determining which heading is the more specific, and hence the more appropriate for classification, a court should compare only the language of the headings and not the language of the subheadings. *See* GRI 1, 3.

Orlando Food Corp. v. United States, 140 F.3d 1437, 1440 (Fed.Cir. 1998); *Schulstad USA Inc. v. United States*, 26 CIT ___ , ___ , 240 F.Supp.2d 1335, 1338 (2002)("GRI" referring to the HTSUS General Rules of Interpretation). As indicated above, the headings favored by the defendant are as follows:

2914 Ketones and quinones, whether or not with other oxygen function, and their halogenated, sulfonated, nitrated, or nitrosated derivatives[.]

2933 Heterocyclic compounds with nitrogen heteroatom(s) only; nucleic acids and their salts[.]

Headnote 3 to HTSUS chapter 29 provides, however, that

> [g]oods which could be included in two or more of the headings of this chapter are to be classified in that one of those headings which occurs last in numerical order.

The plaintiff relies on this note in pressing for classification of its merchandise under heading 2936, to wit:

> Provitamins and vitamins, natural or reproduced by synthesis (including natural concentrates), derivatives thereof used primarily as vitamins, and intermixtures of the foregoing, whether or not in any solvent[.]

With regard to this rubric, the defendant complains that the plaintiff

> ignores, completely, the Government's key point that while the MSB, MSBC, MPB, and MNB undoubtedly are provitamins (albeit *artificial* provitamins), they assuredly do not reproduce natural provitamins[2], and hence, cannot be described, and are not described, by the language of Heading 2936, HTSUS, which, by its terms, only covers natural vitamins, natural provitamins, reproductions of natural vitamins or provitamins, and derivatives of natural vitamins or provitamins.

Defendant's Reply Brief, pp. 1–2 (emphasis in original, footnote 3 omitted). Footnote 2 to this reply states in part:

> *Reproduce* means to produce a copy of something. Inasmuch as the HTSUS heading, in issue, Heading 2936, provides for "[p]rovitamins and vitamins, natural or reproduced by synthesis," clearly, the only provitamins described by this language are natural provitamins or reproductions of natural provitamins, which MSB, MSBC, MPB, and MNB plainly are not* * * *

Id. at 2, n. 2 (emphasis in original).

III

This reply by the defendant is the crux of the controversy at bar. Having studied the affidavits of Dr. John W. Suttie, Dr. T.M. Frye, and Dr. Mark W. LaVorgna, as well as Binder, Benson & Flath, *Eight 1,4-Naphthoquinones From Juglans*, 28 Phytochemistry, pp. 2799-2801 (1989), and Shils & Young, *Vitamin K*, Modern Nutrition in Health and Disease, ch. 14 (7th ed. 1988), proffered by the plaintiff in support of its instant motion, and having compared their rather esoteric contents with those of the two affidavits of Dr. Robert E. Olson filed on behalf of the defendant, the court is unable to conclude that the parties cross-motions completely satisfy the requirement that "there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis in original). The foregoing material matter articulated by the defendant must be addressed at trial and subjected to cross-examination, "which has been said to be the surest test of truth and a better security than the oath." *The Hanover Ins. Co. v. United States*, 25 CIT ___ , ___ , Slip Op. 01–57, p. 21 (2001).

Thus, the parties' cross-motions for summary judgment must be, and they hereby are, denied. Counsel are directed to confer and propose to the court on or before August 1, 2003 a schedule for the necessary preparation for, and conduct of, the trial of those issue(s) of fact which are not already agreed to herein and which cannot be stipulated to in the pretrial order.

So ordered.

(Slip Op. 03–68)

DREXEL CHEMICAL COMPANY, PLAINTIFF *v.*
THE UNITED STATES, DEFENDANT

Court No. 98–02–00295–S

Dated: June 27, 2003

AMENDED JUDGMENT

MUSGRAVE, *Judge*: Upon consideration of the Consent Motion to Amend the Judgment Pursuant to Rule 59(e) and good cause having been shown, it is hereby;

ORDERED that, for the reasons set forth in the Consent Motion to Amend the Judgment Pursuant to Rule 59(e), the Consent Motion is granted; and it is further

ORDERED that the United States pay interest to Drexel as provided by 28 U.S.C. § 2644 and 19 U.S.C. § 1505.

(Slip Op. 03–69)

AMERICAN SILICON TECHNOLOGIES, ELKEM METALS COMPANY AND GLOBE METALLURGICAL INC. PLAINTIFFS *v.* UNITED STATES, DEFENDANT AND LIGAS DE ALUMINIO S.A. DEFENDANT-INTERVENOR. ELETROSILEX S.A., PLAINTIFF *v.* UNITED STATES DEFENDANT AND AMERICAN SILICON TECHNOLOGIES, ELKEM METALS COMPANY AND GLOBE METALLURGICAL INC. DEFENDANT-INTERVENORS.

Consolidated Court No. 99–03–00149

[Plaintiff Eletrosilex, S.A. contests the Department of Commerce's second remand determination applying a 67.93 percent surrogate dumping margin to Eletrosilex as adverse facts available. Eletrosilex contends that: (1) the margin selected by Commerce is not reliable since it was calculated on remand in another administrative review and is now on appeal before the Court of Appeals for the Federal Circuit; and (2) the margin fails to meet the requirement that it be "a reasonably accurate estimate of [its] actual rate, albeit with some built-in increase intended as a deterrent to noncompliance," *see F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("*De Cecco*"). **Held:** Since the surrogate margin selected by Commerce has not been invalidated, Commerce may use it as adverse facts available. The Court also finds that this margin is consistent with the requirement enunciated by the Federal Circuit in *De Cecco*. Therefore, Commerce's second remand determination is sustained.]

Decided: June 27, 2003

Baker Botts, LLP (Samuel J. Waldon, and Matthew T. West) for plaintiffs and defendantintervenors American Silicon Technologies, Elkem Metals Company, and Globe Metallurgical Inc.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Reginald T. Blades, Jr.*), and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Barbara J. Tsai*), of counsel, for defendant.

Dorsey & Whitney, LLP (Philippe M. Bruno and Rosa S. Jeong) for plaintiff and defendantintervenor Eletrosilex, S.A.

OPINION

MUSGRAVE, *Judge*: In this action plaintiff Eletrosilex S.A., a Brazilian producer of silicon metal, challenges the decision by the International Trade Administration of the United States Department of Commerce ("Commerce" or "the agency") to use total adverse facts available to determine its dumping margin in the sixth administrative review of the antidumping duty order on silicon metal from Brazil, *Silicon Metal From Brazil: Final Results of Antidumping Duty Administrative Review*, 64 Fed. Reg. 6305 (Feb. 9, 1999). The Court has remanded this determination twice in prior Opinions. *See American Silicon Technologies v. United States*, 26 CIT ___ , 240 F. Supp. 2d 1306 (2002); *American Silicon Technologies v. United States*, 24 CIT 612, 110 F. Supp. 2d 992 (2000). Most recently, the Court held that the 93.2 percent dumping margin selected by Commerce as adverse facts available for Eletrosilex was disproportionately high relative to commercial practices at and around the relevant time period. 26 CIT at ___ , 240 F. Supp. 2d at 1313. Thus the Court remanded this matter for Commerce to select a different dumping margin. *Id.* Commerce issued its *Final Results of Redetermination Pursuant to Court Remand* ("*Second Remand Results*") on January 22, 2003, and selected a 67.93 percent margin calculated for another respondent in the fourth administrative review as the adverse facts available rate for Eletrosilex. *See Second Remand Results* at 3. In selecting this rate, Commerce reasoned:

> Pursuant to the Court's directive, the Department selected an alternate rate to apply as adverse [facts available] to Eletrosilex. The highest rate calculated for Eletrosilex in any segment of this proceeding was 53.63 percent. The highest rates calculated for other respondents in other segments of this proceeding were 91.06 ("all others rate" from less-than-fair-value (LTFV) investigation), 93.20 (highest rate calculated for any respondent during the LTFV investigation), 61.58 (highest rate calculated for any respondent during the third review of this proceeding) and 81.61 and 67.93 percent (the two highest rates calculated for respondents during the fourth review of this proceeding).
>
> Eletrosilex's previously calculated rate of 53.63 percent is not an appropriate rate for use as adverse [facts available] because the rate was calculated for a review period during which Eletrosilex was cooperative. Hence, the use of this rate would

> not carry an adverse inference. The Court dismissed the 81.61 rate issued in the fourth review period and indicated that margins above 90 percent in this proceeding "lack a rational relationship to Eletrosilex." The Department therefore chose as adverse [facts available] the 67.93 percent calculated rate issued in the fourth administrative review of this case. Because this rate is from a review period that began two years before the instant review period, it should reasonably reflect commercial practices at or around the time in question. Moreover, as the 67.93 percent rate is above Eletrosilex's previously calculated rate of 53.63 percent, the Department finds that this rate serves the Court's directive of selecting a rate that is a "reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance." Therefore, in order to comply with the Court's order, we have selected 67.93 percent as the adverse [facts available] rate to apply to Eletrosilex for the sixth review of this proceeding. Consequently, Eletrosilex's dumping margin for the sixth review of this proceeding will change from 93.20 percent to 67.93 percent.

Second Remand Results at 2–3 (footnote omitted).

Eletrosilex subsequently submitted comments to the Court objecting to the *Remand Results* and Commerce and defendant-intervenors American Silicon Technologies, Elkem Metals Co., and Globe Metallurgical Inc. (collectively "American Silicon") submitted rebuttal comments. For the reasons which follow, the Court sustains Commerce's *Second Remand Results.*

Jurisdiction and Standard of Review

The Court has jurisdiction of this action pursuant to 19 U.S.C. § § 1516a(a) and 28 U.S.C. § 1581(c). The Court shall uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), and *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). This standard requires "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). However, substantial evidence supporting an agency determination must be based on the whole record, and a reviewing court must take into account not only that which supports the agency's

conclusion, but also "whatever in the record fairly detracts from its weight." *Melex USA, Inc. v. United States*, 19 CIT 1130, 1132, 899 F. Supp. 632, 635 (1995) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 478, 488 (1951)).

Discussion

Eletrosilex argues that the 67.93 percent margin is not reliable because it was "calculated for another respondent, Companhia Brasileira Carbureto de Calcio ("CBCC"), in the court-ordered remand proceeding" and "is not a final calculated margin." Eletrosilex's Comments on the Final Results of Redetermination Pursuant to Court Remand ("Eletrosilex's Comments") at 3–4. Eletrosilex notes that Commerce originally calculated and published a 0.37 percent rate for CBCC in the fourth administrative review. *Id.* at 4. This Court reversed Commerce's determination, and on remand Commerce calculated the 67.93 percent rate. The Court entered judgment sustaining the remand results, but subsequently stayed the judgment as it pertained to CBCC pending the outcome of CBCC's appeal, which has yet to be decided. Thus, Eletrosilex concludes that, "the remand decision has not become final and is without any legal effect at this time." *Id.* at 4. Eletrosilex also argues that it is inappropriate to use this rate as adverse facts available because it will have no recourse if the Federal Circuit subsequently finds in CBCC's favor. *Id.* at 6.

Eletrosilex also argues that the 67.93 percent rate is not a reasonably accurate estimate of its actual rate. *Id.* It notes that for three reviews prior to the one at issue its dumping margins were 39.00 percent, 38.39 percent, and 13.18 percent. *Id.* at 7. Moreover, it avers that CBCC was "the *only* respondent, since the original investigation, that received a calculated dumping rate that is significantly over 50 percent." *Id.* (emphasis in the original).

Eletrosilex contends that Commerce chose the 67.93 percent margin because it was slightly higher than Eletrosilex's highest calculated rate and was therefore " 'a reasonably accurate estimate' of Eletrosilex'[s] 'actual rate' of dumping and that the additional 14.3 percent (the difference between the two rates) serves as the 'built-in increase intended as a deterrent to non-compliance.'" *Id.* at 8. Eletrosilex argues that this reasoning is misleading since the 53.63 percent rate was "not calculated for the period of review at issue, but was calculated in the first administrative review" and is therefore "old and irrelevant." *Id.* at 9. Eletrosilex further alleges that the economic conditions in Brazil at the time the 53.63 percent rate was calculated were different from the conditions during the period of review at issue in this action. *Id.* Finally, Eletrosilex challenges the logic behind Commerce's statement that "[t]he fact that Eletrosilex was willing to cooperate in a review to obtain the 53.63 percent rate suggests that, in this review, in which Eletrosilex was not willing to

cooperate, Eletrosilex may have been dumping at a rate significantly higher than 53.63 percent." *Id.* at 10 (quoting *Second Remand Results* at 7–8). Eletrosilex contends that it does not follow that the 53.63 percent margin calculated in an administrative review five years earlier is representative of Eletrosilex's actual dumping margin during the period of review at issue in this case just because Eletrosilex was cooperative in the earlier review. *Id.*

Eletrosilex argues that Commerce should arrive at a reasonable estimate of its dumping rate for this review by looking at its calculated rates in the reviews leading up to this one and its preliminary rate in this review. *Id.* at 10–11. Based on this analysis, Eletrosilex believes that a rate between 33 and 39 percent would be a relatively accurate estimate of its actual dumping margin for this period. *Id.* at 11. Eletrosilex also contends that the extra percentage added to this estimated actual rate as a "deterrent for non-compliance" "should not exceed 14.3 percent." *Id.* As a result, Eletrosilex posits 53.63 percent, its highest ever calculated rate, as an appropriate adverse facts available rate for Commerce to apply in this review. *Id.*

While Eletrosilex argues its case well, the Court does not agree with its conclusions. First, regarding the reliability of the 67.93 percent margin, the Court holds that Commerce may use margins calculated during remand proceedings as adverse facts available, even if they are under appeal. The Court concludes that there is no meaningful difference between the question of whether Commerce may use a margin that is on appeal before the Federal Circuit and the question of whether Commerce may use a margin that is in litigation before this Court. In *D & L Supply Co. v. United States*, 113 F.3d 1220 (Fed. Cir. 1997), the Federal Circuit held that Commerce could not use a margin that had been invalidated as the best information available ("BIA")[1] margin for an uncooperative respondent. The court qualified this holding by stating:

> This is not to say that Commerce must wait until a particular antidumping duty rate has been judicially blessed or has otherwise become final before that rate can be used as the basis for calculating a BIA rate. A margin that has not yet been overturned is presumed to be accurate and can properly be used in the BIA determination.

Id. at 1224. Based on this presumption of accuracy and the fact that the margin in question has been sustained by this Court, Commerce is permitted to use the 67.93 margin as adverse facts available.

The Court also finds that the rate selected by Commerce on remand bears a rational relationship to Eletrosilex's commercial practices and meets the requirement that it be "a reasonably accurate es-

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[1] The statute formerly referred to "facts available" and "best information available." *Compare* 19 U.S.C. § 1677e(c)(1988) *with* 19 U.S.C. § 1677e(a)(1994).

timate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). Unlike the rate previously assigned to Eletrosilex, which was calculated in the original Less-Than-Fair-Value Investigation that began six years earlier, see *American Silicon Technologies*, 26 CIT at ___ , 240 F. Supp. 2d at 1312, the 67.93 percent margin was calculated in an administrative review only two years prior to the period of review at issue in this action. Although Eletrosilex's highest prior rate, 53.63 percent, was calculated five years prior to the period in question, that does not make it irrelevant to this determination. Since Eletrosilex had previously dumped at that level, it is not unreasonable for Commerce to conclude that its actual rate could have once again fallen in this range.[2] In light of this, the 67.93 percent margin is not an unreasonably high surrogate margin for Commerce to apply to Eletrosilex in this review.

Conclusion

For the foregoing reasons, the *Second Remand Results* are sustained, and judgment shall enter in this action.

(Slip Op. 03–70)

FIRTH RIXSON SPECIAL STEELS LIMITED PLAINTIFF *v.* UNITED STATES, DEFENDANT AND CARPENTER TECHNOLOGY CORP.; CRUCIBLE SPECIALTIES METALS DIV. CRUCIBLE METALS CORP.; ELECTROALLOY CORP.; SLATER STEELS CORP., FORT WAYNE SPECIALTY ALLOYS DIVISION; AND THE UNITED STEEL WORKERS OF AMERICA, AFL-CIO/CLC, DEFENDANT-INTERVENORS

Court No. 02–00273

[The plaintiff challenged antidumping investigation finding that questionnaire responses warranted adverse inference in selection of facts otherwise available; CIT Rule 56.2 motion denied, judgment for the defendant.]

Decided: June 27, 2003

Pillsbury Winthrop LLP, Washington DC (*Christopher R. Wall*), for the plaintiff.
Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen*, Director, Civil Division, Commercial Litigation Branch, United States Department of Justice

[2] While Eletrosilex states that the 53.63 percent dumping margin resulted from economic conditions in Brazil that were not present at the time of the review at issue in this action, it has provided no evidence to support this assertion. In the *Second Remand Results* Commerce rejected this argument noting that another respondent received only a 0.42 percent margin for that same period. *Second Remand Results* at 7. Thus it is not readily apparent that economic conditions were a direct cause of Eletrosilex's prior margin.

(*A. David Lafer*), Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*James K. Lockett*), of counsel, for the defendant.

Collier Shannon Scott, PLLC, (*Robin H. Gilbert*), Washington, D.C., for the defendantintervenors.

OPINION

MUSGRAVE, *Judge*: Plaintiff Firth Rixson Special Steels Limited ("FRSS") appeals the margin determined in an antidumping investigation conducted by the International Trade Administration of the United States Department of Commerce ("Commerce"or the "Department") and published *sub nom. Notice of Final Determination of Sale at Less Than Fair Value: Stainless Steel Bar From the United Kingdom*, 67 Fed. Reg. 3146 (Jan. 23, 2002). *See* PDoc[1] 157 (unpublished version). *See also Antidumping Duty Order: Stainless Steel Bar from the United Kingdom*, 67 Fed. Reg. 10381 (Mar. 7, 2002), PDoc 165. Commerce determined that FRSS had failed to act to the best of its ability by not submitting costs and expenses for subject merchandise produced and sold by Spencer Clark, an affiliate that was dismantled three months before the petition was filed. As a result, Commerce employed an adverse inference in the selection of facts otherwise available and determined a duty margin of 125.77% for FRSS. FRSS moves for remand pursuant to CIT Rule 56.2, arguing that Commerce's decision is unsupported by substantial evidence on the record or not in accordance with law. Specifically, FRSS argues that the record shows it acted to the best of its ability in providing all the data it had or could obtain with respect to Spencer Clark, that it was unlawful for Commerce to refuse to verify its responses, and that the margin from the petition selected as facts otherwise available was uncorroborated and therefore unlawful. The government and the defendant-intervenors (petitioners) argue that the final determination should be sustained. On the reasoning below, the Court denies the plaintiff's motion and grants judgment to the defendant.

Background

The petitioners' allegation of dumping of stainless steel bar ("SSB") from countries including the United Kingdom was filed on December 28, 2000. CDoc 1. The investigation into the petition was initiated January 2, 2001. *Notice of Initiation of Antidumping Duty Investigations: Stainless Steel Bar from France, Germany, Italy, Korea, Taiwan, and the United Kingdom*, 66 Fed. Reg. 7620 (Jan. 24, 2001), PDoc 17. Commerce selected the three largest producers/exporters of SSB from the United Kingdom as mandatory respondents. *See* PDoc 31. On February 20, 2001, Commerce sent anti-

[1] The public and confidential documents of the administrative record are herein referenced "PDoc" and CDoc," respectively.

dumping duty questionnaires to each concerning their respective SSB sales in the U.S. and the U.K. over the period October 1, 1999 to September 30, 2000 (the "POI"). PDoc 38.

FRSS submitted answers to section A on March 23, 2001 and to sections B–D on April 12, 2001, and it sent cost reconciliation data for section D on May 16, 2001. PDoc 54, CDoc 8; PDoc 62, CDoc 13; PDoc 72, CDoc 18, respectively. Among other responses, in its section A responses to questions about affiliates, FRSS did not indicate that it had any which had produced and sold subject merchandise during the POI. In answer to question "6b," which requested financial documents for "all affiliates involved in the production or sale of subject merchandise in the foreign market and the U.S. market," FRSS asserted that it had "no affiliates" involved in such "during the period of investigation."

The petitioners commented that FRSS's section A–C responses were insufficient and contained, among other items, incorrectly formatted product control numbers ("CONNUMs"), incorrect or no grade codes for many sales, incorrect customer codes, incorrect shipment dates, no inventory carry costs, incorrect invoice dates and invoice numbers and incorrect destination codes. *See* PDoc 60, CDoc 11; PDoc 65, CDoc 14. Accordingly, Commerce deemed FRSS's response(s) "deficient and/or unresponsive" and on May 21, 2001 sent a supplemental questionnaire requesting, among other things, data on costs and price adjustments for FRSS's SSB sales in the U.S. and the United Kingdom. PDoc 73, CDoc 19. FRSS responded on June 11, 2001, in part:

> A short history detailing the creation of FRSS as it existed during the POI may help to explain FRSS's reporting problems. FRSS is the principle operating subsidiary of Firth Rixson plc ("Firth Rixson") engaged in the production and sale of [SSB]. FRSS was created on September 25, 1998 with the renaming of Barworth Flockton Ltd., a company acquired by Firth Rixson on December 22, 1997. Barworth Flockton did not produce [SSB]. In December 1998, Firth Rixson acquired Spartan (Sheffield) Ltd. and transferred Spartan's production capacity and sales to FRSS's site in Ecclesfield, Sheffield. On August 27, 1999, Firth Rixson acquired the Aurora Group. One company in the Aurora Group, Spencer Clark, was renamed Firth Rixson Metals Ltd. ("FRM"). On October 1, 2000, the production capacity and sales of FRM were transferred to FRSS.
>
> FRSS has thoroughly reviewed all available data for the period before and after the Aurora Group acquisition and has determined that information and data concerning many adjustments to price for sales by Spencer Clark during the POI and information and data that could be used to produce cost calculations for the Department's CONNUM-specific model simply do not exist.

> FRSS requests that the Department use a non-adverse facts available methodology to "fill in the blanks" for Spencer Clark information and data that were destroyed, lost, or never available prior to the filing of the petition.
>
> FRSS has made and will continue to make its best cooperative efforts to locate any information and data necessary to respond to the Department's questionnaire. But FRSS cannot provide information and data that do not exist. Sales of Spencer Clark can be identified by invoice numbers starting with "C" or "M" in the home market and "E" on sales to the U.S.

PDoc 81, CDoc 24, at 2.

At Commerce's request, on June 14, 2001, Commerce met with counsel for FRSS to discuss FRSS's various responses. A Department memorandum of June 18, 2001 purports to summarize the meeting. PDoc 85. Regarding FRSS's section A–C supplemental response, the memorandum notes that FRSS provided "minimal information" on SSB produced and sold by Spencer Clark during the POI. Commerce requested FRSS: (1) to "clarify what additional information might be available for reporting purposes[;]" (2) to "provide Spencer Clark's trial balances and financial statements covering the POI[;]" (3) to "report the total quantity and value of sales of SSB made by Spencer Clark in the U.S. and home markets during the POI, and what percentage of FRSS's total home market and U.S. sales they represent[;]" and (4) to clarify "the role of Firth Rixson Metals Inc. in the U.S. sales made by Spencer Clark during the POI." *Id.* at 1–2. Regarding FRSS's original section D response, the memorandum described it as "largely inadequate" and "lack[ing] the elementary detail and narrative explanations necessary for cost calculation purposes" although the "[s]pecific areas of concern were communicated through the Department's section D supplemental questionnaire that was issued on June 15, 2001." *Id.* at 2. Regarding FRSS's non-Spencer Clark responses, the memorandum noted that FRSS had to date failed to provide: (1) quantity and value reconciliations; (2) a complete explanation of its product/grade coding system; (3) chemical content information for all grades sold in the U.S. and home markets during the POI and the three most similar home-market matches for each U.S. grade sold; (4) a control number concordance; and (5) calculation worksheets demonstrating the methodology used to derive the per-unit expense amounts reported in the home market and U.S. sales listings. *See id.* at 3. Commerce provided a copy of the memorandum to FRSS on June 18, 2001 and allowed until June 22, 2001 to file a response thereto.

The supplemental section D questionnaire sent the day following the meeting with Commerce allowed FRSS until June 29, 2001 to respond. PDoc 82, CDoc 25. This supplemental questionnaire requested, *inter alia*, control numbers for Spencer Clark's products, its

production quantities, and product-specific and average-cost figures for Spencer Clark SSB products produced and sold during the POI. Commerce stated that it intended to use Spencer Clark's average cost as a starting point for product-specific costs. FRSS submitted responses on June 22, 2001 and June 29, 2001. PDoc 87, CDoc 27; PDoc 90, CDoc 29. FRSS responded to each of Commerce's questions, but regarding Commerce's request for average cost of production for Spencer Clark SSB FRSS responded "[t]here is no way to calculate this figure from the data available to FRSS." PDoc 90, CDoc 29, at 14.

In its July 26, 2001 *Facts Available Memorandum* written prior to publication of the preliminary determination ("*FA Memo*"), Commerce noted that Spencer Clark accounted for a certain significant percentage of FRSS's U.S. sales as well as a certain significant percentage of FRSS's home market sales of subject merchandise during the POI. PDoc 105, CDoc 36, at 4 (footnote 4). See PDoc 87, CDoc 27, at 2–3. After reviewing Spencer Clark's trial balances and audited financial statements, Commerce determined it could not accept the claim that the data sought (*i.e.*, complete costs of production for Spencer Clark SSB products) did not exist because Spencer Clark's financial information had been reviewed and consolidated with that of FRSS and its parent by an independent auditing firm. *Id.* at 3, referencing PDoc 54, CDoc 8, at Attachment 8. The *FA Memo* noted that "FRSS has made no attempt to present an alternate methodology to enable the Department to calculate cost and selling expenses for [Spencer Clark's] SSB products." *Id.* at 4.

In the preliminary determination on the investigation, Commerce considered that FRSS's latest submissions were "partially responsive" but still "lack[ing] the basic product, sales expense, and cost of production information necessary to perform the antidumping margin analysis" in reference to the missing Spencer Clark data. *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Stainless Steel Bar From the United Kingdom*, 66 Fed. Reg. 40192, 40194 (Aug. 2, 2001). Commerce concluded that an adverse inference was warranted because "FRSS failed to identify an affiliated producer of SSB which produced and sold SSB during the POI until late in the investigation, and then failed to provide basic sales and cost data for its affiliate." *Id.* As a result, Commerce selected as adverse facts available the highest margin alleged in the antidumping petition. *Id.* See 19 U.S.C. § 1677e(b).

On August 2, 2001, at the request of FRSS, Commerce met with counsel to discuss the preliminary determination. *See* PDoc 112. FRSS states that at the meeting, it addressed Commerce's outstanding concerns by pointing to specific responses in its prior submis-

sions.[2] Thereafter, on August 13, 2001 Commerce issued another supplemental questionnaire to FRSS. This questionnaire asked only about matters pertaining to Spencer Clark. PDoc 114. In it, Commerce called attention to the fact that FRSS's independent auditors had opined that FRSS's financial statements had been prepared in accordance with the United Kingdom's Companies Act 1985 and that the auditors had noted that the Act requires private and public companies incorporated thereunder to retain their accounting records for three and six years, respectively, and that in forming their opinion, auditors must consider, among other things, that proper accounting records have been kept. Commerce requested FRSS to: (a) reconcile this requirement with its claim that Spencer Clark's records for the POI did not exist, (b) explain in detail why the requested Spencer Clark records do not exist, (c) explain what efforts were made to locate the company's records for purposes of responding to the Department's questionnaire, (d) provide a list of the records that are available, (e) provide a detailed list of the records that are not available, (f) provide source documentation to support a claim on the record-keeping requirements of Spencer Clark to do business in the United Kingdom and reconcile its response to this question to the claim that Spencer Clark records for the POI do not exist, and finally (g) provide a detailed list of the sales, cost and financial records that Firth Rixson plc had available to it for each company in the Aurora Group during and after the acquisition in August 1999. *Id.*

On August 20, 2001, FRSS responded by providing what it claims was "all available information" on Spencer Clark. FRSS further explained the circumstances of the Spencer Clark acquisition as part of the Aurora Group: that Spencer Clark's SSB-related turnover was an immaterial part of total Aurora Group sales and had not been considered integral to the acquisition since it was unrelated to Firth Rixson's primary forgings business; that Spencer Clark's operations continued on a limited basis (specifically, for shipment of product under pre-existing orders but not to accept new orders) as a separate, stand-alone business with the same (previous) employees and with only limited interaction with FRSS management; and that it was dismantled on or about September 30, 2000. FRSS clarified Commerce's point with respect to the unqualified opinion of the independent auditors by noting, among other things, that

> companies in the United Kingdom are required by the Companies Act 1985 to retain for a period of three to six years the general ledger, cash book, debtor and creditor ledgers, balance sheets and accounting period inventory records. It is presumed

[2] Specifically, FRSS states that it pointed to pages B–25 and C–27 and Attachment 6 of PDoc 62, CDoc 13; page 22 of PDoc 81, CDoc 24; pages 1–3, 5 and Attachment 6 of PDoc 87, CDoc 27; and pages 1–14 and Attachment 6 of PDoc 90, CDoc 29.

> that these records existed at the time [the independent auditors] audited Firth Rixson's accounts as of September 30, 2000, prior to the filing of the petition. However, that can only be presumed from the fact that [the independent auditors] gave an unqualified opinion.

CDoc 38. The response further stated that except for Spencer Clark's trial balances, balance sheet, profit and loss account, statement of tangible fixed assets, notes on the accounts, group cash flow statement, taxation account, total cost of sales, and administrative expenses (see Attachment 4 to CDoc 27 and Attachment 7 to CDoc 29), it was nonetheless a "fact" that FRSS could not locate the specific cost and expense information for SSB sales that Commerce desired. *Id.*

Counsel for FRSS met again with Commerce on August 22, 2001 prior to the final determination. *See* CDoc 39. A memorandum summarizes that "treatment of * * * FRSS in the U.K. SSBar investigation" was discussed but Commerce "basically informed" counsel that it was declining to conduct verification because of the significant percentages of home market and U.S. sales for which FRSS had failed to provide complete data, *i.e.*, due to the absence of Spencer Clark SSB cost and expense data. On August 31, 2001, Commerce formally informed FRSS that in light of such missing data, there was no basis upon which to conduct verification. PDoc 122.

Subsequently, Commerce explained its full position at Comment 1 of the *Issues and Decision Memorandum for the Final Determination of the Antidumping Duty Investigation of Stainless Steel Bar from the United Kingdom* (Jan. 15, 2002) ("*Decision Memo*"), PDoc 156 at 7–11. Basically, Commerce found that FRSS had not acted to the best of its ability and determined to draw an adverse inference in selecting from facts otherwise available. Specifically, Commerce concluded that FRSS had "provided virtually no responses to the Department's cost questions and failed to provide" a cost of production and constructed value database, *id.* at 7, and it found the "claim that [FRSS] no longer has the necessary information is contradicted by information on the record" in the form of FRSS's "access" to a "detailed sales journal" and a "product line trial balance" which FRSS could have used as a starting point to a cost response. *Id.* Commerce also believed FRSS must at some point have had the records it requested because in order to obtain "a clean audit opinion, the auditors would have had to test the allocation of production costs between cost of sales and ending inventory to ensure the proper matching of cost of sales with sales revenue[.]" Commerce concluded that at a minimum FRSS could have obtained the auditors' work papers which might have provided usable Cost of production data, and/or FRSS could have proposed an alternate method for determining Spencer Clark cost of production. *Id.*

Commerce concluded that FRSS's responses were incomplete due to their "depth and kind of information" which was of "low quality" and "unresponsive" because it was within FRSS's capacity to provide "the right kind of information" given that FRSS had "access to" the specific information aforementioned. Commerce "questioned how important business and accounting information of this nature can be 'lost' entirely, even in a company takeover scenario" because, according to Commere, "[t]his is the type of information that a company should and would keep in the ordinary course of reasonable business operations." *Id.* at 8. Commerce thus believed this to be "a situation where existing information of a material nature was made unavailable by the actions of the company itself" without offering any "credible and rational explanation of how and why" the information came to be "lost," and that even if it was "lost" FRSS had "not shown that it was unable to respond in any way to the Department's requests for the missing information." *Id.* at 8–9. Thus, Commerce concluded that FRSS "did not want the Department to see this data relating to Spencer Clark" and that an adverse inference was justified. *Id.* at 9. In addition, Commerce disagreed with FRSS's assertion that the non-Spencer Clark deficiencies had been rectified. *Id.*, referencing PDoc 105, CDoc 36 (*FA Memo*).

Commerce examined as adverse facts otherwise available the highest margin in the petition, and "corroborated" that alleged margin by comparing the price and cost data in the petition with data provided by Corus, the "other participating respondent in this investigation." *Id.* at 10. Commerce found the petition data to be "in the range" of data provided by such participating respondent and that the margin in the petition therefore has "probative value." *Id.* at 10–11, referencing Statement of Administrative Action to the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, vol. 1, at 870 (1994) (adverse inferences are appropriate to "ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully").

On January 23, 2002, Commerce issued its final determination. This action followed.

Discussion

Jurisdiction here is pursuant to 28 U.S.C. § 1581(c). To prevail in an action such as this, a plaintiff must demonstrate that the challenged agency determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), and *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). This standard requires "something less than

the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). However, substantial evidence supporting the agency's determination must be based on the whole record, and a reviewing court must take into account not only that which supports the agency's conclusion, but also "whatever in the record fairly detracts from its weight." *Melex USA, Inc. v. United States*, 19 CIT 1130, 1132, 899 F.Supp. 632, 635 (1995) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 478, 488 (1951)).

I.

FRSS argues that substantial evidence does not support Commerce's determination that it did not act to the best of its ability. It argues that it responded to all of Commerce's requests for information during the investigation and asserts that by the time of the preliminary determination it was led to believe that all of the outstanding matters had been resolved except for Commerce's desire for SSB-specific cost and expense data pertaining to Spencer Clark. With respect to the specific SSB data Commerce sought, FRSS states that it provided all available financial information for Spencer Clark in June 2001 and respectfully requested Commerce to "fill in the blanks" because the information was no longer available, if it ever had been. FRSS argues that an adverse inference is unwarranted in view of its responsiveness to the requests specified by Commerce and its diligence during the investigation to comply with those requests. Pl.'s Br. at 7, referencing *Olympic Adhesives, Inc. v. United States*, 799 F.2d 1565, 1572 (Fed. Cir. 1990) (respondent did not "refuse" or "was unable" to supply information within the meaning of 19 U.S.C. § 1677e(b) (1982) by responding that there was no data to provide.); *Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States*, 20 CIT 1426, 1435–36, 951 F.Supp. 231, 239 (1996) (unreasonable to penalize failure to submit data that do not exist).

Further, FRSS argues that Commerce's decision not to conduct verification was unlawful because Commerce had ample time to analyze and confirm the nonexistence of the data it sought before making a final determination. FRSS points out that its responses were not "late" but were provided one and a half months before the preliminary determination and three months before verification of exporters' responses. Lastly, FRSS challenges the antidumping duty margin that was selected from the petition as uncorroborated.

The government and the petitioners argue that there is ample evidence on the administrative record to support Commerce's decision that FRSS did not act to the best of its ability. They contend FRSS impeded the investigation with numerous erroneous responses requiring time and effort to correct or clarify. They point out that

Spencer Clark should have been disclosed at the outset of the investigation in response to section A question 2 of the original questionnaire, but instead FRSS affirmatively asserted in question 6B of its March 23, 2001 response that "[t]here were no affiliates involved in the production or sale of the merchandise under investigation in the U.K." The government and the petitioners thus portray FRSS has having purposefully avoided full disclosure, and the *Decision Memo* concludes that FRSS's "inability" to comply was a situation of its own making.

Upon receipt of a request for information from Commerce, an interested party experiencing difficulty meeting the "form and manner" of such request may notify Commerce of such difficulty, "together with a full explanation and suggested alternative forms in which such party is able to submit the information[.]" 19 U.S.C. § 1677m(c)(1). Upon receipt of such notification, Commerce is required to "consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party." *Id.* Commerce is required to "take into account any difficulties experienced by interested parties, particularly small companies, in supplying [the requested] information" and also to "provide to such interested parties any assistance that is practicable in supplying such information." 19 U.S.C. § 1677m(c)(2). If Commerce "determines that a response to a request for information "does not comply with the request," Commerce must "promptly inform the person submitting the response of the nature of the deficiency" and it must also, "to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of [the] investigation[.]" 19 U.S.C. § 1677m(d). If the interested party submits further information in response to a notice of deficiency, and Commerce "finds that such response is not satisfactory," then Commerce "may, subject to subsection (e) of this section, disregard all or part of the original and subsequent responses." 19 U.S.C. § 1677m(d). The referenced subsection (e) provides that in an investigation such as this, Commerce "shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by" Commerce if the information "is submitted by the deadline established for its submission," "can be verified," "is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination," "can be used without undue difficulties[,]" and "the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce] * * * with respect to the information[.]" 19 U.S.C. § 1677m(e)(1)—(5).

A determination on the margin must be made regardless of the information available at the administrative proceeding. 19 U.S.C. § 1677e(a). Commerce must use "facts otherwise available" where (1) necessary information is not available on the record, or (2) where an interested party (A) withholds requested information, (B) fails to provide it timely or in the form and manner requested (subject to 19 U.S.C. §§ 1677m(c)(1) and (e)), (C) significantly impedes the proceeding, or (D) provides the requested information but it cannot be verified as provided in 19 U.S.C. § 1677m(i). *Id.* The use of facts otherwise available under all of these situations is expressly subject to the limitations of section 1677m(d), *id.*, however, if "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information[,]" Commerce is also permitted to draw an adverse inference. 19 U.S.C. § 1677e(b).

If Commerce draws an adverse inference, Commerce must clearly articulate the finding that a party failed to act to the best of its ability and clearly articulate why the missing information is significant to the progress of the proceeding. *See, e.g., Nippon Steel Corp. v. United States*, 24 CIT 1158, 1169–70, 118 F.Supp.2d 1366, 1378 (2000); *Ferro Union, Inc. v. United States*, 23 CIT 178, 200, 44 F.Supp.2d 1310, 1331 (1999). Commerce's explanation must include a determination that an interested party "could comply, or would have had the capability of complying if it knowingly did not place itself in a condition where it could not comply[,]" and that the failure to comply was either willful or below the standard expected of a reasonable respondent. 24 CIT at 1171, 118 F.Supp.2d at 1379. *See, e.g., Borden, Inc. v. United States*, 22 CIT 233, 264, 4 F.Supp.2d 1221, 1246 (1998), *opinion after remand*, 22 CIT 1153 (1998), *aff'd sub nom. F.lli De Cecco di Filippo Fara S. Martino S.p.A v. United States*, 216 F.3d 1027 (Fed. Cir. 2000).

As described in the *Decision Memo*, Commerce's decision to employ an adverse inference was cumulative. In articulating that FRSS had not acted to the best of its ability, Commerce stated that FRSS submitted evasive and incomplete responses, and in particular failed to provide cost and expense data for Spencer Clark, did not explain why it could not do so, and failed to provide an average cost figure for use as a "starting point" for Spencer Clark SSB costs and expenses.

The government and the petitioners raise the point that Commerce provided "numerous" opportunities to FRSS to respond via supplemental questionnaires and meetings with counsel over the course of the investigation. FRSS emphasizes that this was its first U.S. international trade law proceeding, that a respondent's unfamiliarity with such proceedings is to be considered, that clarification and correction of responses is a normal part of the administrative procedure, and that the alleged "other-than-Spencer-Clark" deficiencies are "red herrings" because they were each addressed at the Au-

gust 2, 2001 meeting with Department officials. Pl.'s Reply, referencing Pl.'s Br. at 3–4 & App. Tabs 4–7.

Accuracy in the margin determination is an ideal of U.S. international trade law. *See, e.g., Rubberflex SDN. BHD v. United States*, 23 CIT 461, 469, 59 F.Supp. 1338, 1346 (1999). Towards that end, "it is essential that a respondent provide Commerce with accurate, credible, and verifiable information" via its questionnaire responses. *Gourmet Equipment (Taiwan) Corp. v. United States*, 24 CIT 572, 574 (2000). *See Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1560 (Fed. Cir. 1994) (cooperation of interested parties is essential to determination of accurate dumping margins within "extremely short statutory deadlines"); *Carpenter Technology Corp. v. United States*, Slip Op. 02–77 (CIT 2002) at 10 ("If a request from Commerce is unclear, it is incumbent upon parties to assist the administrative process and clarify the precise information sought."). It is also essential that Commerce fulfill its statutory duties to provide assistance to interested parties to the administrative proceeding as circumstances require. *See* 19 U.S.C. § 1677m(c) & (d). Whether a party has complied with a request for necessary information is a matter within Commerce's discretion,[3] but since the nature of investigation is to proceed from the general to the specific, as information is uncovered,[4] the appropriate exercise of that discretion must involve consideration not only of the directness of the response but of the clarity of the question(s) posed. Commerce must provide "meaningful opportunity" to respond to an allegedly deficient response. *E.g., China Steel Corp v. United States*, Slip Op. 03–52 (CIT 2003); *Am. Silicon Tech. v. United States*, 24 CIT 612, 624–25, 110 F.Supp.2d 992, 1003 (2000); *Mitsui & Co. v. United States*, 18 CIT 185, 202 (1994).

The August 9, 2001 memorandum of the August 2 meeting between FRSS and Commerce to discuss the *FA Memo* indicates that counsel pointed to specific responses that the *FA Memo* claimed were deficient with respect to sales made by FRSS,[5] and counsel asked Commerce to "explain the additional information required." PDoc 112. "Counsel for FRSS also requested that the company be given the opportunity to place additional information on the record in response to the Department's questionnaire." *Id.*[6] Subsequently, in the *Decision Memo*, Commerce disagreed that all of the non-Spencer

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[3] *E.g., Allegheny Ludlum Corp. v. United States*, 24 CIT 1424, 1441, 215 F.Supp.2d 1322, 1338 (2000); *Helmerich & Payne, Inc. v. United States*, 22 CIT 928, 931, 24 F.Supp.2d 304, 308 (1998); *Daido Corp. v. United States*, 19 CIT 853, 861, 893 F.Supp. 43, 49–50 (1995).

[4] *See, e.g., Antidumping Manual*, Ch. 4, part III ("Supplemental Questionnaires") (DOC/IA) (Jan. 22, 1998) at 15:

> The antidumping duty questionnaire presented to respondents in the early stages of the investigation or administrative review is generally not our sole request for information. A review of just about any case file will normally uncover a number of requests for further information. These requests are generally sent out to obtain information previously requested and not received, to clarify information submitted * * *, or to obtain new information based on data submitted or changed circumstances of the investigation or review.

[5] *See supra*, footnote 2. *See also* PDoc 147 (FRSS's *Case Brief*), CDoc 56, at 3–4.

[6] The memorandum next summarizes that counsel for FRSS and Department officials also discussed the matter of the outstanding necessary Spencer Clark information. PDoc 112.

Clark issues had been resolved completely and noted that FRSS reported incomplete chemical content information for each grade sold in the U.S. and home markets during the POI, incomplete most-similar grade match information, insufficient narrative for cost calculations, and no cost information for certain products (CONNUMs) in its U.S. sales listing. PDoc 156 at 10, referencing PDoc 105, CDoc 36 (*FA Memo*). Commerce insisted on a clear explanation of what happened to the Spencer Clark data it sought and why it could not be located, yet in light of FRSS's request for explanation of what additional information would be required and the August 13 supplemental questionnaire from Commerce, which addressed only matters pertaining to Spencer Clark and made no mention of the outstanding non-Spencer Clark matters, *see* PDoc 114, Commerce failed to provide a clear explanation of why FRSS's response(s) to date on non-Spencer Clark matters continued to be deficient. *See* 19 U.S.C. § 1677m(d) (Commerce "shall promptly inform the person submitting the response of the nature of the deficiency* * * * *").

Whether these "other" issues were material to the finding that FRSS had not acted to the best of its ability, the capstone of that finding concerned FRSS's responsiveness over matters concerning Spencer Clark. FRSS emphasizes that it did not have the ability to provide the requested SSBspecific cost and expense data. Both Commerce and FRSS presume that FRSS's audit would have included or covered sales of the Spencer Clark SSB product line, and the government references *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1336 (Fed. Cir. 2002),[7] to argue that FRSS had an obligation to maintain Spencer Clark's records. *See also Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1983) (citation omitted) ("The burden of production should belong to the party in possession of the necessary information."). However, the circumstances of this matter pertain to the initial investigation, which was begun approximately three months after Spencer Clark was permanently dismantled. During that interval, FRSS did not have "legal" notice indicating the need to retain and preserve any data of Spencer Clark which might specifically pertain to SSB production costs, and FRSS explained in response to Commerce's August 2 supplemental questionnaire that the Companies Act 1985 did not require retention

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[7] In *Ta Chen*, the outstanding antidumping duty order subjected Ta Chen to periodic review of exports of stainless steel pipe to the United States since 1992. *Amended Final Determination and Antidumping Duty Order; Certain Welded Stainless Steel Pipe From Taiwan*, 57 Fed. Reg. 62300 (Dec. 30, 1992). The issue challenged by Ta Chen in court involved amendment of the definition of "affiliate" for purposes of the antidumping statute by the Uruguay Round Agreements Act, Pub.L. No. 103–465, 108 Stat 4809 (1994) effective January 1, 1995. *Compare* 19 U.S.C. § 1677 (33) (2000) *with* 19 U.S.C. § 1677 (13) (1988). The change in definition effected Ta Chen's statutory relationship with Sun Stainless, Inc., which was sold to third parties during the latter part of the third administrative review period. Administrative review of that period was initiated in 1996, and resulted in a finding of noncompliance against Ta Chen for failure to supply sales data for Sun. Ta Chen was successful in challenging that ruling in court, but when the matter was remanded to Commerce and Ta Chen sought to obtain the sales data from Sun, Sun's new owners refused to comply with the request. Ultimately, on appeal, the majority of the appellate panel sustained partial adverse facts available against a respondent for not inducing its former affiliate under new ownership to provide information sought by Commerce concerning the affiliate's prior business. Judge Gajarsa's noteworthy dissent criticizes the decision for "concludl[ing] that Commerce may penalize importers for failure to engage in divination." *Ta Chen*, 298 F.3d at 1340 (Gajarsa, J., dissenting).

of such particular data, if it ever existed. This is not an "unsubstantiated assertion," and there is nothing of record to support Commerce's rejection of FRSS's characterization of U.K. law. *Ta Chen* is inapplicable.

The petitioners also called Commerce's attention to their announced intention to file a dumping petition in the September 25, 2000 issue of *Metal Bulletin*,[8] and they imply that FRSS thereby received implied or actual notice before the petition was filed and sought to avoid disclosure of the sought-after Spencer Clark data as a consequence of publication. FRSS had asserted that Spencer Clark had been operated as a stand alone business and amounted to an insignificant aspect of FRSS's global consolidated operations, and that when Spencer Clark was finally transferred to FRSS it was dismantled, its site vacated, personnel discharged, computers turned off, file cabinets emptied, and production capacity sent to a subsidiary of FRSS. *See* PDoc 147 (FRSS *Case Brief*), CDoc 56, at 6–7 (citation omitted). The petitioners emphasized to Commerce that FRSS never explained *why* the data were lost or where they went. Commerce agreed that FRSS's explanation was unsatisfactory and inferred that the data it sought ought to constitute the type of business information that is fundamental to company operations and should therefore have been retained as a matter of sound business practice.

FRSS contends that the reasoning does not apply to an operation that is being wound down and will no longer be a going concern. The record shows that Spencer Clark was dismantled by September 30, 2000 and that rationalization of Spencer Clark had been ongoing since FRSS acquired the Aurora Group, as evidenced by the fact that Spencer Clark had taken on no new orders during the POI but only serviced existing contracts. *Cf.* CDoc 27 ("Notes of the accounts") n.26 ("Exceptional items * * * Rationalisation—specific"). If FRSS's business focus is forgings and not SSB products, as a matter of document retention FRSS's explanation would not be unreasonable and would be consistent with its description of Spencer Clark as having been continued as a separate, stand-alone business with its same (previous) employees and with only limited interaction with FRSS management. And yet, as an affiliate consolidated in FRSS's financial statements, Spencer Clark is presumed to have been under FRSS's operational control.[9] There is nothing of record from which to infer that FRSS is uninterested in SSB business and/or to negate the presumption of operational control to the extent that a reviewing court could agree with FRSS that it might otherwise justifiably plead ignorance of Spencer Clark's product line operating costs. As

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[8] *See* PDoc 153, CDoc 60, Attachment A.

[9] The definition of "affiliate" under U.S. international trade law implicates operational control. *See* 19 U.S.C. § 1677(33) ("affiliated" and "affiliated persons" are "[t]wo or more persons directly or indirectly controlling, controlled by, or under common control with, any person" or "[a]ny person who controls any other person and such other person" and "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person."). *See also* 19 C.F.R. § 351.102(b) (2001).

the finder of fact, Commerce is entitled to consider what information a reasonable business manager would be expected to retain, maintain, or know in, or as the result of, the ordinary or extraordinary course of business, and the Court is not free to disagree. *See Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) ("the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."). But, as a matter of law and based on the administrative record at hand, the failure to provide the *specific* data Commerce sought did not amount to "willful" noncompliance or equate to an ability to comply with the request. The *Decision Memorandum*'s reasoning behind such failure amounts to gratuitous speculation.

The *Decision Memo* faults FRSS for failing to estimate SSB cost of production based upon available information. In turn, the *Decision Memo* may be faulted for assuming the existence of such a journal, which FRSS claims was never maintained. It may also be faulted for stating that the Spencer Clark financial information reveals total cost of sales "by product line," which implies breakout figures for separate product lines (SSB and others), whereas the record information reveals only total cost of goods sold. *Cf.* CDoc 24 at Attachment 4 (profit/loss account). Furthermore, as FRSS points out, Commerce's proposed solution would yield neither a product-specific nor an average cost. "Dividing a single, aggregated, inseparable cost figure containing subject and nonsubject products by a quantity of subject and non-subject products would yield a single, simple average cost for subject and non-subject products. This information would be useless." Pl.'s Br. at 12.

An administrative decision may be sustained despite "less than ideal clarity if the agency's path may be reasonably discerned[.]" *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). Because FRSS submitted sales data for subject merchandise, Commerce concluded that FRSS could quantify nonsubject merchandise just as well, and therefore Commerce may have believed it was possible to derive an average SSB cost using the total cost of goods sold figure on some *pro rata* basis. But if that was the point, Commerce ought to have renewed such a request at the meeting of August 2, 2001 and/or in the supplemental questionnaire to FRSS on August 13, 2001 or otherwise have afforded FRSS the chance to remedy a potential deficiency based on misunderstanding. The record shows that Commerce was provided the relevant financial information for Spencer Clark in June 2001, it made the request for average Spencer Clark SSB cost in the June 15, 2001 supplemental questionnaire, and it was further aware that FRSS experienced difficulty in complying with that request in light of FRSS's response (based on its apparent belief) that "[t]here is no way to calculate this figure from the data available to FRSS." PDoc 90, CDoc 29, at 14.

FRSS responded substantively to Commerce's August 13 questions on August 20, 2001 and provided what it asserted was "all available information" on Spencer Clark, but the August 13 questions focused on the disposition of the missing Spencer Clark data, *e.g.* requesting FRSS to "reconcile" its claims in light of Commerce's belief that FRSS was able to provide the missing Spencer Clark data. Again, clarity in the request for information is prerequisite to determining insufficiency in the response,[10] and Commerce ought to have indicated in that final request the method it had in mind for calculating average SSB production costs and expenses or otherwise provided assistance on determining the "starting point," in order to afford FRSS the opportunity to remedy a prior deficiency.[11] Even still, asks FRSS,

> The question is: a "starting point" for what? FRSS informed Commerce that the Spencer Clark [submitted] financial data * * * contained aggregated, inseparable data that include subject and non-subject merchandise including "tool and high speed steel, carbon and manganese steels, alloy and superalloys, nimonics, titanium, stainless steels, plus * * * hirework on a variety of customer's [*sic*] own materials."
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> * * * FRSS has repeatedly informed Commerce, there are no Spencer Clark accounting records of raw materials usage, scrap quantity or values, labor hours per unit of product produced, energy usuage per unit of product produced, machine hours per unit of product produced, yield factors, or any of the other records that a respondent needs in order to produce a product-specific cost or even an average cost for [the] broade[st] group-[ing] of subject merchandise.

Pl.'s Br. at 12, referencing CDoc 29.

The foregoing adequately addresses FRSS's *inability* to comply with requests to provide the *specific* data sought, but Commerce's decision that FRSS did not act to the best of its ability is also underpinned by certain other noncompliance issues, including failure to attempt contact with its auditors (whose audit work papers might have yielded usable cost of production data) and failure to do more

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[10] *I.e.*, Commerce is under statutory obligation to "consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party[,]" 19 U.S.C. § 1677m(c)(1), to "take into account any difficulties experienced by interested parties * * * in supplying [requested] information[,]" 19 U.S.C. § 1677m(c)(2), and to "provide to such interested parties any assistance that is practicable in supplying such information." *Id.*

[11] As mentioned, in the final supplemental questionnaire to FRSS Commerce focused mainly upon "reconciliation" of FRSS's claim that it could not provide requested data with their presumed existence at the time of independent audit. Commerce requested FRSS to explain why the requested Spencer Clark records do not exist and what efforts were made to locate the company's records and provide lists of the records that are available and those that are not available, substantiate business record-keeping requirements in the United Kingdom, and provide a detailed list of the sales, cost and financial records that Firth Rixson plc had available to it for each company in the Aurora Group during and after the acquisition in August 1999.

than merely assert that FRSS interviewed ex-Spencer Clark employees in search of the information Commerce requested. FRSS's brief states that Commerce does not accept average costs for subject merchandise and that it would still have been impossible, based upon "imagination" or available financial information, to determine realistic product-specific or average SSB costs, and therefore its apparent response is that such exercise would have been futile. *See* Pl.'s Br. at 13 (referencing *Light Walled Welded Rectangular Carbon Steel Tubing From Taiwan: Final Results of Antidumping Duty Administrative Review*, 57 Fed. Reg. 24464, 24465 (June 9, 1992)).

On the one hand, Commerce did not make such specific requests of FRSS. On the other hand, Commerce indicated to FRSS that it intended to use average cost as a "starting point" on June 15, 2001. PDoc 82, CDoc 25. If FRSS considered that its short response on the subject to Commerce would end the matter, it underestimated the purpose of the proceeding and the significance of Spencer Clark's SSB sales to accurate determination of its margin. Whether or not ex-Spencer Clark employees would have been in a position to "fill the gaps" on Spencer Clark's SSB production costs and expenses and/or useful cost-of-production data could have been obtained from the auditors' work papers, Commerce concluded that FRSS should have been motivated to support its position by providing more documentation for the administrative record. FRSS's argument that it acted to the best of its ability would have been strengthened had it produced even a list of the ex- Spencer Clark employees it had interviewed or a statement from its auditors regarding examination of Spencer Clark's costs of SSB sales.[12] *See* PDoc 116, CDoc 38, at 5.

In addition, Commerce was clearly troubled by the fact that FRSS first disclosed Spencer Clark "late in the investigation," as characterized by the government. Def.'s Memo at 13. FRSS argues that the information was submitted "early in the investigation" because it was submitted two months prior to the preliminary determination, three months prior to U.K. verification, and nearly seven months prior to the final determination. Pl.'s Reply at 3. The flip-side of that point is the fact that FRSS's disclosure occurred nearly five months after initiation of the investigation, but, be that as it may, FRSS does not adequately address the reasons for its original misstatement and its subsequent *volte face*. Commerce's interpretation of contradictory responses is a matter within its discretion.

Obviously, the absence of complete cost and expense data posed a serious problem for the accurate determination of the margin. FRSS may not have had the ability to provide the *specific* data Commerce

[12] FRSS also notes that adverse facts available are intended to serve as a deterrent against non-cooperative parties for withholding data in future proceedings and argues the use of adverse facts available cannot serve as a deterrent in this situation because FRSS is not "withholding" data and in subsequent proceedings any data relating to Spencer Clark will not be an issue. Pl.'s Br. at 19–20 (referencing *inter alia Krupp Thyssen Nirosta GmbH v. United States*, Slip Op. 01–84 at 7 (CIT 2001)). That is likely true, but the argument does not address Commerce's broader consideration of FRSS's general cooperation.

sought,[13] but based upon the overall administrative record of the issue, the Court is constrained to conclude that substantial evidence supports Commerce's determination that FRSS did not, in accordance with 19 U.S.C. § 1677e(b), demonstrate that it acted to the best of its ability to work with Commerce on a solution to overcome the problem. *Cf.* 19 U.S.C. § 1677m(e)(4).

II.

FRSS also argues that Commerce's decision not to conduct verification of FRSS's responses was unlawful. The Court rejects the argument. 19 U.S.C. § 1677m(i)(1) requires Commerce to verify "all information" relied upon in making a final determination in an investigation. Positive proof of the nonexistence of the requested Spencer Clark data may be a logical impossibility, but it was nonetheless incumbent upon FRSS to make out a *prima facie* case for verification. *Cf. Industrial Fasteners Group, Am. Importers Ass'n v. United States*, 710 F.2d 1576, 1582 n.10 (Fed. Cir. 1983) ("In the absence of such information making at least a *prima facie* case as to India's proper establishment of the CCS payments, ITA did not have to verify the information supplied by India."). In view of the significance of Spencer Clark's SBB sales to the investigation and the lawfulness of the decision to draw an adverse inference, substantial evidence on the record supports Commerce's determination that verification was unnecessary.

III.

Lastly, FRSS argues that even if an adverse inference is permissible, Commerce failed to determine a reasonably accurate and appropriate margin because Commerce merely assigned to it the highest margin from the petition instead of properly analyzing the data FRSS submitted. FRSS argues the petition margin was uncorroborated and bears "no resemblance to the realities of the marketplace." Pl.'s Br. at 18. It contends that Commerce had "extensive" information provided by other respondents in this and concurrent investigations and that a margin 28 times higher than the margin imposed on the other respondent in this investigation is unreasonable. *Id.* at 20.

An adverse inference permits Commerce to rely on information derived from the petition, the final determination, a previous review or any other information placed on the record. 19 U.S.C. § 1677e(b). When Commerce relies on information other than information obtained during the course of the investigation or review, Commerce must, "to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." 19 U.S.C.

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[13] FRSS also asserted that it spent tens of thousands of dollars in search of the requested data. If so, that is regrettable, because an interested party should never have to expend unreasonable time or sums on a Sisyphian exercise.

§ 1677e(c). *See Borden, Inc. v. United States, supra*, 22 CIT at 264–65, 4 F.Supp.2d at 1247. The adverse facts selected must be "rationally related to sales, indicative of customary selling practices, and not unduly harsh or punitive." Krupp Thyssen Nirosta GmbH v. United States, Slip Op. 01–84 at 7 (CIT 2001).[14]

In *Borden, supra*, this Court was skeptical that certain margins from that petition were useable because Commerce had found them "high" for all parties whose data had been verified and because the "possibility" that the respondent's "true" margin may be in the high end of the range was merely an unsupported inference. 22 CIT at 265, 4 F.Supp.2d at 1247. Commerce did not make such a finding here. After comparing the petition's price and cost data with data provided by Corus (the "other participating respondent in this investigation"), Commere found the petition data to be "in the range" of the unverified data provided by Corus and therefore of "probative value." PDoc 156 at 10–11. That is, Commerce corroborated by choosing a particular SSB product's sales alleged in the petition and comparing the ranges for constructed value ("CV") and other home market pricing and constructed export price ("CEP") or export price ("EP") pricing for the U.S. market against the respective ranges of such values from the unverified data provided by Corus for such product. CDoc 36 at 7–8. For the final determination, Commerce reexamined the price and cost information in light of information developed during the investigation and "continued to find that the rates contained in the petition have probative value." 67 Fed. Reg. at 3148.

In other words, Commerce corroborated the highest petition rate via inductive reasoning. Since Crownridge did not participate in the proceeding, it appears that Commerce has done what it could to "corroborate that information from independent sources that are reasonably at [its] disposal" to the extent practicable. *See* 19 U.S.C. § 1677e(c). FRSS has not suggested what other method might have been employed to prove or disprove.

Conclusion

Taking into consideration the final less-than-fair-value determination with respect to FRSS as a whole, the Court must conclude that

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[14] Commerce has "discretion to choose which sources and facts it will rely on to support an adverse inference" but its "discretion in these matters * * * is not unbounded." *F.lli De Cecco di Filippo Fara S. Martino S.p.A, supra*, 216 F.3d at 1023. The Court of Appeals for the Federal Circuit stated in that case,

> the purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins* * * * It is clear from Congress's imposition of the corroboration requirement in 19 U.S.C. § 1677e(c) that it intended for an adverse facts available rate to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance. Congress could not have intended for Commerce's discretion to include the ability to select unreasonably high rates with no relationship to the respondent's actual dumping margin. Obviously a higher adverse margin creates a stronger deterrent, but Congress tempered deterrent value with the corroboration requirement. It could only have done so to prevent the petition rate (or other adverse inference rate), when unreasonable, from prevailing and to block any temptation by Commerce to overreach reality in seeking to maximize deterrence.

Id. (citation omitted). *See Am. Silicon Technologies v. United States*, 240 F.Supp.2d 1306 (2002).

FRSS has not met its burden of proving that there is not substantial evidence to support the determination or that it is otherwise not in accordance with law. In the absence of such proof, the determination must be sustained.

(Slip Op. 03–71)

FORMER EMPLOYEES OF MURRAY ENGINEERING, PLAINTIFFS *v.* THE UNITED STATES, DEFENDANT

Court No. 03–00219

(Dated: June 25, 2003)

ORDER

RIDGWAY, *Judge*: Upon consideration of the defendant's consent motion for voluntary remand, it is hereby

ORDERED that the consent motion is granted; and it is further

ORDERED that this action in remanded to the United States Department of Labor to conduct a further investigation and to make a redetermination as to whether petitioners are eligible for certification for worker adjustment assistance benefits; and it is further

ORDERED that remand results shall be filed no later than 60 days after the date of this order; and it is further

ORDERED that the plaintiffs shall file papers with the Court indicating whether they are satisfied or dissatisfied with the remand results no later than 30 days after the remand results are filed with the Court; and it is further

ORDERED that the deadline for the filing of (1) the answer pursuant to Rule 12(a)(1)(A); and (2) the administrative record pursuant to 28 U.S.C. § 2635(d)(1) and Rule 72(a) shall be extended to 30 days after the plaintiffs indicate whether they are satisfied or dissatisfied with the remand results.

(Slip Op. 03–72)

FORMER EMPLOYEES OF AMERIPHONE, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 03–00243

(Dated: June 25, 2003)

ORDER

Upon consideration of defendant's consent motion for voluntary remand, it is hereby

ORDERED that the motion is granted; and it is further

ORDERED that this action is remanded to the Department of Labor to conduct a further investigation and to make a redetermination as to whether petitioners are eligible for certification for transitional adjustment assistance benefits, and it is further

ORDERED that the remand results shall be filed no later than 60 days after the date of this order, and it is further

ORDERED that plaintiffs shall file papers with the Court indicating whether they are satisfied or dissatisfied with the remand results no later than 30 days after the remand results are filed with the Court, and it is further

ORDERED that the deadline for the filing of (1) the answer pursuant to Rule 12(a)(1)(A), and (2) the administrative record pursuant to 28 U.S.C. § 2635(d)(1) and Rule 72(a), shall be extended to 30 days after plaintiffs indicate whether they are satisfied or dissatisfied with the remand results.

(Slip Op. 03–74)

FAG KUGELFISCHER GEORG SCHÄFER AG, FAG ITALIA S.p.A., BARDEN CORPORATION (U.K.) LTD., FAG BEARINGS CORPORATION AND THE BARDEN CORPORATION, PLAINTIFFS AND INA WÄLZLAGER SCHAEFFLER oHG AND INA USA CORPORATION, PLAINTIFF-INTERVENORS *v.* UNITED STATES, DEFENDANT AND TIMKEN U.S. CORPORATION, DEFENDANT-INTERVENOR

Court No. 00–09–00441

(Dated: June 30, 2003)

JUDGMENT

TSOUCALAS, *Judge*: This Court, having received and reviewed the United States Department of Commerce, International Trade Ad-

ministration's ("Commerce") *Final Results of Redetermination Pursuant to Court Remand* ("*Remand Results*"), *FAG Kugelfischer Georg Schäfer AG v. United States*, 2002 Ct. Intl. Trade LEXIS 118, Slip Op. 02-119 (Oct. 4, 2002), comments and reply comments of FAG Kugelfischer Georg Schäfer AG, FAG Italia S.p.A., Barden Corporation (U.K.) Ltd., FAG Bearings Corporation and The Barden Corporation, and INA Wälzlager Schaeffler oHG and INA USA Corporation, rebuttal comments of Timken U.S. Corporation[1] and Commerce's response, holds that Commerce duly complied with the Court's remand order, and it is hereby

ORDERED that the *Remand Results* filed by Commerce on January 2, 2003, are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

(Slip Op. 03–75)

SKF USA INC., SKF GmbH, SKF FRANCE S.A., SARMA, SKF INDUSTRIE S.p.A. AND SKF SVERIGE AB, PLAINTIFFS, AND INA WAZLAGER SCHAEFFLER oHG AND INA USA CORPORATION, PLAINTIFF-INTERVENORS, *v.* UNITED STATES, DEFENDANT, AND TIMKEN U.S. CORPORATION, DEFENDANT-INTERVENOR

Court No. 00–09–00448

(Dated: June 30, 2003)

JUDGMENT

TSOUCALAS, *Judge*: This Court, having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") *Final Results of Redetermination Pursuant to Court Remand* ("*Remand Results*"), *SKF USA Inc. v. United States*, 2002 Ct. Intl. Trade LEXIS 127, Slip Op. 02–129 (Oct. 25, 2002), comments of SKF USA Inc., SKF GmbH, SKF France S.A., Sarma, SKF Industrie S.p.A. and SKF Sverige AB, comments and reply comments of INA Wälzlager Schaeffler oHG and INA USA Corporation, rebuttal comments of Timken U.S. Corporation[1] and Commerce's response, holds that Commerce duly complied with the Court's remand order, and it is hereby

[1] On February 28, 2003, Stewart and Stewart notified the Court that The Torrington Company was acquired by The Timken Company, and is now known as Timken U.S. Corporation.

[1] On February 28, 2003, Stewart and Stewart notified the Court that The Torrington Company was acquired by The Timken Company, and is now known as Timken U.S. Corporation.

ORDERED that the *Remand Results* filed by Commerce January 23, 2003, are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

(Slip Op. 03–76)

NSK LTD. AND NSK CORPORATION; NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN DRIVESHAFT, INC. AND NTN-BOWER CORPORATION; AND TIMKEN U.S. CORPORATION, PLAINTIFFS AND DEFENDANT-INTERVENORS, *v.* UNITED STATES, DEFENDANT, KOYO SEIKO CO., LTD. AND KOYO CORPORATION OF U.S.A.; AND NACHI-FUJIKOSHI CORP., NACHI AMERICA, INC. AND NACHI TECHNOLOGY, INC., DEFENDANT-INTERVENORS

Consol. Court No. 98–07–02527

[Commerce's *Remand Results* are affirmed in part and remanded in part. Case remanded.]

(Dated: June 30, 2003)

Crowell & Moring LLP (*Robert A. Lipstein, Matthew P. Jaffe* and *Grace W. Lawson*) for NSK Ltd. and NSK Corporation, plaintiffs and defendant-intervenors.

Barnes, Richardson & Colburn (*Donald J. Unger, Kazumune V. Kano, Carolyn D. Amadon* and *William J. Murphy*) for NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc. and NTN-Bower Corporation, plaintiffs and defendant-intervenors.

Stewart and Stewart (*Terence P. Stewart* and *Geert De Prest*) for Timken U.S. Corporation, plaintiff and defendant-intervenor.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Lucius B. Lau*, Assistant Director); of counsel: *David R. Mason*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for the United States, defendant.

Sidley Austin Brown & Wood LLP (*Neil R. Ellis*) for Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A., defendant-intervenors.

O'Melveny & Myers LLP, (*Greyson L. Bryan* and *Michael A. Meyer*) for Nachi-Fujikoshi Corp., Nachi America, Inc. and Nachi Technology, Inc., defendant-intervenors.

OPINION

I. Standard of Review

TSOUCALAS, *Judge*: The Court will uphold Commerce's redetermination pursuant to the Court's remand unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). Substantial evidence

is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966)

II. Background

On July 8, 2002, this Court issued an order directing the United States Department of Commerce, International Trade Administration ("Commerce")

> (1) to determine whether NSK's cylindrical roller bearings at issue are (a) complex merchandise that encompasses characteristics so numerous that the process of valuation shall be entrusted to Commerce's discretion, or (b) merchandise that can be matched in accordance with the statutorily provided hierarchy; * * * and (2) with regard to NTN's minor inputs, to (a) * * * provide the Court with a sufficient and reasonable explanation of Commerce's methodology; or (b) if Commerce is unable to do so, amend *Final Results*, 63 Fed. Reg 33,320, accordingly.

NSK Ltd. v. United States, 26 CIT ___ , ___ , 217 F. Supp. 2d 1291, 1341 (2002). On December 9, 2002, Commerce submitted its *Final Results of Redetermination Pursuant to Court Remand* ("*Remand Results*"). On January 7, 2003, NSK Ltd. and NSK Corporation (collectively "NSK") filed comments with this Court regarding the *Remand Results*. On January 22, 2003, NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc. and NTN-Bower Corporation (collectively "NTN") filed comments with this Court, as well. Subsequently, Commerce filed a response and The Torrington Company, hereinafter referred to as Timken U.S. Corporation ("Timken")[1], submitted rebuttal comments.

III. Commerce's Use of Different Definitions of the Term "Foreign Like Product"

A. Contentions of the Parties

1. NSK's Contentions

NSK contends that the Remand Results failed to provide a reason-

[1] On February 28, 2003, Stewart and Stewart notified the Court that The Torrington Company was acquired by The Timken Company, and is now known as Timken U.S. Corporation.

able explanation regarding Commerce's use of differing definitions of the term "foreign like product" in its constructed value ("CV") and normal value ("NV") price-based calculations. *See* Comments of NSK on Remand Determination ("NSK's Comments") at 1–7. NSK begins by urging the Court to dismiss any arguments relating to the legislative history of the term "foreign like product."[2] *See id.* at 3. NSK later frames two issues that it claims must be decided by the Court: (1) whether the contemporaneity rule, under 19 U.S.C. § 1677b(a)(1)(A) (1994), is applicable to CV profit calculations, and (2) whether a legally acceptable application of the contemporaneity rule prevents Commerce's use of the preferred CV profit methodology under 19 U.S.C. § 1677b(e)(2)(A) (1994).[3] *See* NSK's Comments at 4, 8.

Addressing the first issue, NSK points to Commerce's statement in the *Remand Results* that "the contemporaneity provision of [19 U.S.C. § 1677b(a)(1)(A)] does not apply to CV[,]" *Remand Results* at 41, and argues that no section of Title 19 links the contemporaneity requirement to CV profit calculations. *See* NSK's Comments at 4–7. NSK further argues that Commerce's use of noncontemporaneous data, in other words data based on the full period of review ("POR") as opposed to only several months, in Commerce's CV profit computation serves as evidence that Commerce believes that the contemporaneity rule does not apply to cost-based calculations. *See id.* at 5–6. NSK uses this conclusion to argue that the *Remand Results* ultimately reveal an inconsistency in Commerce's logic because Commerce rejected data reported by NSK as non-contemporaneous while simultaneously including other noncontemporaneous sales in the CV profit calculation.[4]

While attacking Commerce's second statement, *see supra* note 3, NSK further contends that substantial record evidence supports the conclusion that the preferred methodology for calculating CV profit under 19 U.S.C. § 1677b(e)(2)(A) is "fully operational" if Commerce defines foreign like product in the same manner when calculating CV profit and NV. *See* NSK's Comments at 8–10. NSK suggests that

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[2] The Court disagrees with NSK's argument because disregarding the legislative history of the antidumping statute would cripple the Court's ability to determine the reasonableness of Commerce's interpretation of the same statute. *See Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (citations omitted).

[3] To prove that Commerce violated the antidumping statute and that Commerce did not adhere to the order of *NSK Ltd.*, 26 CIT at _____, 217 F. Supp. 2d at 1341, NSK attacks the following two arguments made by Commerce in the *Remand Results*: (1) " * * * 'Congress did not intend to have the application of the preferred methodology defeat the contemporaneity requirement of [19 U.S.C. § 1677b(a)(1)(A),]' *Remand Results* at 25; and

> (2) [I]f [Commerce] were required to interpret and apply the term 'foreign like product' in precisely the same manner in the CV-profit context as in the price context, there would be no sales of the foreign like product upon which to base the CV-profit calculation. Accordingly, the preferred method of calculating CV profit established by Congress would become an inoperative provision of the statute.

Id. at 11.

[4] The first argument raised by NSK is not at issue since Commerce, at no time, claims that the contemporaneity rule applies specifically to the sales it considers when calculating CV profit. Instead, Commerce asserts that 19 U.S.C. § 1677b(a)(1)(A) is relevant to Commerce's "overall determination" of NV. Although the Court agrees that it would be anomalous to reject data as noncontemporaneous and then use other data that is itself noncontemporaneous in the same proceeding, Commerce adequately explains the relationship between its NV and CV profit calculating methodologies.

Commerce should use all the data provided to it by NSK, instead of applying the contemporaneity rule, and utilizing sales which only extend from three months prior to the month of the United States sale to two months after the month of sale. *See id.* at 9. If Commerce cannot find the necessary data to calculate CV under the preferred methodology by extending the range of the data used, NSK proposes that Commerce calculate CV using one of the alternative methodologies listed under 19 U.S.C. § 1677b(e)(2)(B) (1994). *See* NSK's Comments at 9–10. Accordingly, NSK argues that Commerce's explanation of its use of differing definitions for the term "foreign like product" should be rejected.

2. Commerce's Contentions

Commerce states that the *Remand Results* contain the same explanation provided in *SKF USA Inc. v. United States*, 2002 Ct. Intl. Trade LEXIS 65, at *1, Slip-Op. 02–63 (July 12, 2002), with regards to the use of differing definitions of the term "foreign like product." *See* Def.'s Resp. NSK's Comments Concerning Remand Determination ("Def.'s Resp.") at 3–4. According to Commerce, the explanation provided in the Remand Results "rebutt[s] the presumption that the term 'foreign like product' should have the same meaning in each of the pertinent parts of the statute in which it appears." *Id.* at 5. Commerce contends that the use of different definitions of foreign like product is "necessary in order to give meaning to all parts of the statute," since mandating Commerce to use the same definition would

> preclude the use of the preferred methodology for profit because (1) the preferred methodology refers to profit in connection with the production and sale of a "foreign like product" made in the "ordinary course of trade"; and (2) the statement of administrative action indicates that Commerce will resort to constructed value only if there are no above-cost sales in the ordinary course of trade.

Id. at 6. Commerce adds that restricting Commerce's use of different definitions of the term "foreign like product" would be unfeasible in instances where non-contemporaneous sales are rejected in price-to-price comparisons. *See id.* According to Commerce, such a practice would result in profit calculations that are based solely on non-contemporaneous sales, which would be contrary to the contemporaneity requirement of 19 U.S.C. § 1677(b)(a)(1)(A). *See id.* at 6–7. Commerce also argues that use of different definitions of "foreign like product" is warranted when applying the viability provision of 19 U.S.C. § 1677b(a)(1)(C)(ii) (1994). *See id.* at 7.

3. Timken's Contentions

Timken suggests that the Court follow *RHP Bearings Ltd. v. United States*, 2003 Ct. Intl. Trade LEXIS 11, *9–*15, Slip-Op. 03–10

(Jan. 28, 2003), and affirm Commerce's *Remand Results* since NSK's arguments have been addressed and rejected. *See* Rebuttal Comments of The Torrington Co. ("Timken's Comments") at 2. Timken offers no additional substantive arguments with regards to Commerce's use of different definitions of the term "foreign like product."

B. Analysis

In *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001), the Court of Appeals for the Federal Circuit ("CAFC") stated that since Congress used the term "foreign like product" in various sections of the antidumping statute and specifically defines the term in 19 U.S.C. § 1677(16) (1994), it is

> presume[d] that Congress intended that the term have the same meaning in each of the pertinent sections or subsections of the statute, and * * * that Congress intended that Commerce, in defining the term, would define it consistently. Without an explanation sufficient to rebut this presumption, Commerce cannot give the term "foreign like product" a different definition (at least in the same proceeding) when making the [NV] price determination and in making the constructed value determination. This is particularly so because the two provisions are directed to the same calculation, namely, the computation of normal value (or its proxy, constructed value) of the subject merchandise.

The CAFC concluded that Commerce failed to explain its justification for the inconsistent use of the term "foreign like product" and outlined the explanation that Commerce must provide to properly rebut the presumption that Commerce cannot use differing definitions for an identical term in the same proceeding. *See SKF USA*, 263 F.3d at 1382–83. In accordance with the CAFC's decision on this issue in *SKF USA*, this Court ordered Commerce "(1) to determine whether NSK's cylindrical roller bearings at issue are (a) complex merchandise that encompasses characteristics so numerous that the process of valuation shall be entrusted to Commerce's discretion, or (b) merchandise that can be matched in accordance with the statutorily provided hierarchy* * * * *" *NSK Ltd.*, 26 CIT at ___, 217 F. Supp. 2d at 1341.

In the *Remand Results*, Commerce explains that "although [antifriction bearings ("AFBs")] are considered complex merchandise, [Commerce] is capable of performing model matching for cylindrical roller bearings and, in fact, does so, in the first instance, to make price-to-price comparisons under [19 U.S.C. § 1677b(a)]." *Remand Results* at 3. Commerce states further that

> no relevant factual differences [exist] between NSK's cylindrical roller bearings in this case and any other respondent's merchandise in AFBs. As a factual matter, this case is exactly the

> same as the case of *SKF USA Inc. v. United States*[, 2002 Ct. Intl. Trade LEXIS 65, at * 1,] that was decided [on July 12, 2002] by the Court* * * * The complex aspect in both cases involves not only the interpretation of the term "foreign like product" but also the application of that term in the different statutory contexts, together with the deference afforded to [Commerce] under the statute* * * *

Id. Commerce further set out its unique model-matching methodology and reporting requirements of sales transactions used in Commerce's calculation of NV. Commerce explained that if it was "unable to find a sale of a comparison-market model made in the ordinary course of trade that is identical to or shares the family designation of the [United States] sale at a time reasonably corresponding to the time of the [United States] sale, [Commerce then] resort[s] to CV." *Remand Results* at 7. Commerce detailed its calculation of CV, which Commerce derived by adhering to 19 U.S.C. § 1677b(e), and later explained why Commerce "interpreted and applied the statutory term 'foreign like product' more narrowly in its" calculation of NV than in its calculation of CV under 19 U.S.C. § 1677b(e)(2)(A). *Id.* at 10.

According to Commerce, the preferred method for calculating CV, found in 19 U.S.C. § 1677b(e)(2)(A), is to be used unless "there are no home market sales of the foreign like product or because all such sales are at below-cost prices." Id. at 11 (citation omitted). Commerce can use the preferred methodology only if sales of the foreign like product exist that are within the ordinary course of trade. *See* 19 U.S.C. § 1677b(e)(2)(A). Title 19 of the United States Code and the Statement of Administrative Action ("SAA")[5] establish that only when "no abovecost sales [exist] in the ordinary course of trade in the foreign market under consideration will Commerce [then] resort to [CV]." SAA at 833 (emphasis in original). Accordingly, Commerce argues that if it were to use the same definition of the term "foreign like product" for the NV and CV profit calculations, it would eliminate all sales of the foreign like product upon which to base the CV profit calculation and would mandate that Commerce use one of the alternative methods listed under 19 U.S.C. § 1677b(e)(2)(B)(i) through (iii) to calculate CV. *See Remand Results* at 11–13; *see also SKF USA*, 263 F.3d at 1376–77. Commerce explained that this outcome is common in every situation where foreign like product is interpreted in the same manner for both price and CV profit determinations.

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[5] The SAA represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements." H.R. Doc. 103-316, at 656 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040. "[I]t is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id.*; *see also* 19 U.S.C. § 3512(d) (1994) ("The statement of administrative action approved by the Congress * * * shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.")

Commerce further explains that differing categories of merchandise can satisfy the meaning of the term "foreign like product," depending on the specific facts of each antidumping proceeding, and illustrates this point by explaining its usual practice of deriving different values, including NV. *See id.* at 12–17. In determining the viability of a comparison market for NV under 19 U.S.C. § 1677b(a)(1)(C) (1994), Commerce adds that it normally employs the definition of the term "foreign like product" provided under § 1677(16)(C). *See Remand Results* at 18; *Proposed Rule of Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7307, 7333 (Feb. 27, 1996). To find foreign like products that would fit into the definition provided under § 1677(16)(A) (identical products versus products of the "same general class or kind"), and to use such products in its viability determination would require Commerce to perform a product-specific matching analysis, and other analyses, requiring data not yet available to Commerce. *See Remand Results* at 16. The SAA makes clear that "Commerce must determine whether the home market is viable at an early stage in the [antidumping] proceeding to inform exporters which sales to report." SAA at 821. Commerce poses a similar argument when explaining its normal practice of calculating whether reasonable grounds to believe or suspect below cost sales exist under 19 U.S.C. § 1677b(b)(2)(A)(i) (1994), and adds that it defines the term "foreign like product" consistently in determining CV profits. *See Remand Results* at 20–25.

Contrary to the contentions espoused by NSK, the Court finds that the *Remand Results* provide sufficient explanation to rebut the presumption that Commerce cannot use differing definitions for an identical term in the same proceeding. *See FAG Kugelfischer Georg Schafer AG v. United States*, Nos. 02–1500, –1538, 2003 U.S. App. LEXIS 11607, *2 (CIT June 11, 2003). Commerce adequately explained why the differing use of the same term is necessary to establish NV and CV profit in the same antidumping proceeding. Commerce set out the factual background of its calculations and provided the Court with an adequate and reasonable explanation of why the methodology at issue enables it to comply with the statute. Accordingly, Commerce followed the mandate of *NSK Ltd.*

IV. Commerce's Treatment of All NTN Affiliated-Party Inputs as Minor Inputs

A. Contentions of the Parties

1. NTN's Contentions

NTN contends that the record information supplied to Commerce adequately distinguished between major and minor inputs purchased by NTN from affiliated and unaffiliated suppliers. *See* Com

ments of NTN on Remand Determination ("NTN's Comments") at 1–2. According to NTN, specifications, such as the names of parts, part numbers and average prices, were provided to Commerce in NTN's original Questionnaire Response, and the record was later supplemented with information regarding standard cost comparisons of materials and processing. *See id.* at 2 & app. A, Attach. D–6. NTN adds that its Supplemental Questionnaire Response includes "a table of codes * * * describing the codes that indicate assemblies, inner ring, outer ring, rolling elements, retainers and shields[,]" which are all characteristics used by Commerce to distinguish between major and minor inputs. *See* NTN's Comments at 2 & app. A, Attach. D–6. NTN argues, therefore, that since Commerce was provided with information necessary to distinguish between major and minor inputs, Commerce should follow the mandate of the major input rule, *see* 19 U.S.C. § 1677b(f)(3) (1994), and exclude minor inputs from the methodology reserved for major inputs. *See* NTN's Comments at 3–5.

2. Commerce's Contentions

Commerce responds that it incorrectly stated that "NTN did not include market prices" in the information supplied to Commerce. *See Remand Results* at 47. Commerce states that it properly used the information provided by NTN, but was unable to distinguish between major and minor inputs due to limitations in NTN's data. *See id.* Given this limitation, Commerce admits that it assumed that all NTN inputs were minor inputs. *See id.*

3. Timken's Contentions

Timken asserts that NTN has already received the relief it is seeking since Commerce did not apply the major input rule prescribed in 19 U.S.C. § 1677b(f)(3) to any of NTN's minor inputs. *See* Timken's Comments at 3–4. Timken further argues that NTN's persistence that the data provided to Commerce sufficiently distinguished between major and minor inputs actually works against NTN's interest. *See id.* at 4. Therefore, Timken contends that "NTN's true argument appears to be that Commerce cannot lawfully resort to [cost of production] when valuing minor inputs," id. at 5, and that NTN provides no support for such an assertion. *See id.* Accordingly, Timken argues that Commerce's methodology should be affirmed.

B. Analysis

According to the Court in *NSK Ltd.*, "[i]f NTN provided Commerce with sufficient record evidence to discriminate between 'major' and 'minor' inputs, it was Commerce's obligation to either: (1) exclude

'minor' inputs from the reach of Commerce's methodology reserved for 'major' inputs; or (2) articulate why Commerce's 'major input' methodology is equally applicable to 'minor' or any inputs." *NSK Ltd.*, 26 CIT at ___ , 217 F. Supp. 2d at 1322. In the *Remand Results*, Commerce states that "the database NTN provided with information concerning affiliated-party inputs did not distinguish between major and 'minor' inputs NTN had purchased from affiliated suppliers." Remand Results at 46. Commerce admits that since NTN was not asked "to identify which inputs were major and which were minor, [Commerce] treated all of NTN's affiliated-party inputs as minor inputs." *Id.* at 47. However, NTN's comments and exhibits have persuaded the Court to find otherwise. *See* NTN's Comments at 1–5 & app. A, Attach. D–6. According to NTN, Commerce was supplied with the information necessary to distinguish between NTN's major and minor inputs. Attachment D–6 of NTN's Supplemental Questionnaire Response supplied Commerce with a comparison of standard costs associated with processing NTN's AFBs. NTN also provided Commerce with a table of codes, that when compared to the standard cost comparison, would allow Commerce to distinguish between NTN's major and minor inputs. Since Commerce failed to provide a reasonable explanation articulating why the major input rule is applicable to minor inputs, the Court finds that Commerce failed to follow the mandate of *NSK Ltd.*, 26 CIT at ___, 217 F. Supp. 2d at 1341. Moreover, the Court rejects Timken's arguments that following the order of NSK Ltd. would actually work against NTN's interest and remands this issue to Commerce.

V. Conclusion

The Court finds that Commerce sufficiently met its burden to explain why a differing definition of the term "foreign like product" is used in calculating NV and CV profit for NSK and, accordingly, affirms Commerce's explanation. With respect to Commerce's treatment of NTN's major and minor inputs, the Court remands to Commerce to exclude "minor" inputs from the reach of Commerce's methodology reserved for "major" inputs in all instances where NTN's data sufficiently distinguished between such inputs.

(Slip Op. 03–77)

UNITED STATES, PLAINTIFF *v.* NEW-FORM MANUFACTURING COMPANY, LTD., DEFENDANT

Court No. 01–00034

[Judgment by default entered for Plaintiff in customs civil penalty action, imposing maximum penalty for gross negligence, and awarding interest and costs.]

Decided: June 30, 2003

Robert D. McCallum, Jr., Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*A. David Lafer* and *Timothy P. McIlmail*); *Kevin B. Marsh*, Office of the Associate Chief Counsel, Bureau of Customs and Border Protection, United States Department of Homeland Security, Of Counsel; for Plaintiff.

OPINION

RIDGWAY, *Judge*: In this customs penalty action, plaintiff, the United States, seeks a civil penalty against defendant, New-Form Manufacturing Company, Limited, Canada ("New-Form"), for conduct in connection with its importation of steel jack parts from Canada into the United States. Jurisdiction lies under 28 U.S.C. § 1582 (1994).[1]

Pending before the Court is Plaintiff's Application for Default Judgment ("Plaintiff's Application"). For the reasons set forth below, that application is granted. New-Form "has failed to plead or otherwise defend" this action, and default has been entered against it. The record further establishes that, although New-Form knew that its jack parts were subject to antidumping duties, the company failed to accurately classify and describe its merchandise on its invoices, and—when questioned by its broker—denied that the merchandise was jack parts. New-Form's conduct thus violated 19 U.S.C. § 1592, and warrants imposition of the maximum penalty for gross negligence, plus interest and costs.

I. *Background*

A. The Facts of The Case

New-Form, a Canadian corporation located in Canada, manufactured and exported steel jacks and jack parts to the United States.

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[1] While all statutory citations in this opinion are to the 1994 version of the U.S. Code, the pertinent text of the cited provisions was the same at all times relevant herein.

A81 ¶ 3, A101 ¶ 3, A113 ¶ 5(d)—(e).[2] Initially, the company exported completed jacks. But, eventually, it turned to exporting jack parts — including steel beams, handles, large and small runners, lifting pins, reversing levers, pitmans, reversing switches, bases, lever guards, and dowel lift pins—which were then assembled into completed jacks in this country. A66 ¶ 54, A191–92 ¶ 4.

Under cover of more than 30 entries, between February 5, 1996 and October 22, 1997, New- Form caused more than 111,000 jack parts to be entered or introduced into the United States. A84 ¶ 13, A86–87, A102 ¶ 13, A191–92 ¶ 4. Throughout that period, steel jack parts from Canada were subject to antidumping duties. *See* 61 Fed. Reg. 6,627, 6,627–28 (Feb. 21, 1996).

New-Form was aware of the antidumping duty order. Indeed, in 1993, the company sought to have the antidumping duty finding revoked. A1; 60 Fed. Reg. 53,584 (Oct. 16, 1995). However, in its notice of the final results of the 1993–94 administrative review of the finding, the U.S. Department of Commerce explained that New-Form was covered, and described the merchandise covered as "multi-purpose hand-operated heavy-duty steel jacks, * * * measuring from 36 inches to 64 inches high, assembled, semi-assembled and unassembled, *including jack parts*, from Canada." 61 Fed. Reg. 6,627, 6,627–28 (Feb. 21, 1996) (emphasis added).

Moreover, in a September 1997 affidavit (presented in the course of litigation in Canada that is unrelated to this case), New-Form's President—David M. Boulanger—explained that New-Form decided to export jack parts to U.S. to minimize applicable duties. In his words:

> [S]elling the *components* of a given product attracts less duty than would a product in a finished or assembled state; the duty payable is directly proportional to the value of the goods being shipped into the United States.

A65–66 ¶ 54 (emphasis added). *See also* A67 ¶ 59, A72, A171. Included with the affidavit was a chart, submitted by Mr. Boulanger, which indicated that New-Form's "Canadian supplied *components*" were "*subject to U.S. Antidumping duty*." A67 ¶ 58, A69 (emphasis added).

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[2] Citations prefaced with the letter "A" are to documents included in the Appendix to Plaintiff's Application for Default Judgment ("Pl.'s Appl."). Citations prefaced with "SA" are to documents included in the Supplemental Appendix submitted with Plaintiff's Second Response to Court's May 22, 2003 Order ("Pl.'s Supp. Appl.").

Included in the Appendices are: correspondence from New-Form to the U.S. Department of Commerce concerning the antidumping finding on Steel Jacks from Canada; New-Form invoices for the merchandise at issue in this action; a telephone call sheet maintained by New-Form's broker; excerpts from an affidavit prepared by New-Form President David M. Boulanger in an unrelated case; excerpts from the transcript of testimony given at trial by Mr. Boulanger in an unrelated case; excerpts from the Complaint and Answer, as well as discovery requests and responses, in this action; the letter from New-Form's broker to Customs, transmitting payment for unpaid antidumping duties; excerpts from the transcript of Mr. Boulanger's deposition in this action; excerpts from the Harmonized Tariff Schedule of the United States; declarations prepared for this action, by a Customs special agent; Dun & Bradstreet reports on two business concerns related to New-Form; information from the website of Supplierpipeline (one of the two concerns); and several computer-generated reports prepared by Customs concerning the export activities of New-Form and Supplierpipeline.

Although New-Form knew that the components at issue were jack parts and were to be used for jacks, it failed to reflect that fact on its invoices, which were among the documents used to introduce its merchandise into the U.S. A2–63, A108 ¶ 18(b), A115 ¶ 18(b), A123–26 ¶¶ 56–59, A127 ¶ 64, A132 ¶ 64, A133 ¶¶ 56–59. New-Form's invoices also classified the jack parts by Harmonized Tariff Schedule ("HTS") numbers that do not apply to jack parts. Some parts were identified by reference to HTS 8431.10, rather than the more accurate 8431.10.0090. But other parts were identified by reference to 8201.90.60 and 7326.90. A2–63, A182–85.

Moreover, in mid-June 1996, New-Form was asked point-blank by its broker, Tower Group International ("Tower"), whether the merchandise at issue was—tracking the language of the antidumping duty finding—"heavy duty jack parts with a height of 36″–64.″" New-Form responded with an unequivocal "No." A64.

Although New-Form knew that its merchandise was jack parts to be used for jacks, and although New-Form knew that jack parts were subject to antidumping duties, neither New-Form nor Tower paid those duties until years later—when Tower finally paid them, long after the merchandise had been entered, and after this action had been filed.[3] A170. The jack parts at issue were valued at $81,537.31; and the revenue lost to the United States (*i.e.*, the unpaid duties) was, until Tower's payment, $18,466.84. A192 ¶ 5.

As recently as March 2002, New-Form intended to continue doing business in the U.S., and had transferred certain of its functions and personnel to a related company called "Supplierpipeline." A172, A176–77. Mr. Boulanger is not only the President of New-Form and, through Northman Holdings, Inc., its sole shareholder (A65, A171); he is also the President and Chief Executive Officer of Supplierpipeline, which is a subsidiary of Northman Holdings. A171, A187; SA5–6. And Dan Evans, a former Vice President of New-Form, is now a Vice President of Supplierpipeline. A114 ¶ 12; SA5–6, SA10, SA12.

Although New-Form itself has not exported merchandise into this country since December 2002 (SA15–16), it appears that the company's business is being continued through Supplierpipeline. Supplierpipeline represents that it began with "[its] Milverton, Ontario operation of New-Form Manufacturing," and that it manufactures and distributes jacks. A186; SA9. New-Form's internet address—www.new-form.com—leads directly to the website of Supplierpipeline. SA2 ¶ 6. And, although Dun & Bradstreet reports that Supplierpipeline commenced business in 2000 (SA6), Supplierpipeline claims to have been doing business for 11 years. SA11.

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[3] New-Form has never asserted that it believed that the antidumping duties were being paid by Tower; nor could it reasonably do so. The invoices that New-Form received from Tower during the period the merchandise was entered reflected the fact that Tower was not charging New-Form for payment of antidumping duties. *See* A133 ¶ 61.

See also A186 (Supplierpipeline boasts of growth rate "for the past 12 years"). Supplierpipeline even advertises, as one of its products, the "Jackall" jack—the same jack whose parts are the subject of this litigation. A172, A186; SA12, SA14. In fact, in March 2002, Mr. Boulanger, referring to a U.S. auto manufacturer, testified that "we're selling them Jackall jack product from Supplier Pipe Line." A172.

In its Spring 2002 newsletter, "In The Pipeline," Supplierpipeline reported that it was

> combining two of its three manufacturing facilities to offer a better freight solution to its customers. Currently, there are two manufacturing facilities in Mississauga and one in Milverton, Ontario. *The Milverton facility manufactures* Erie Wheelbarrows, *Jackall Jacks* and many * * * other seasonal lawn and garden products.

SA9 (emphasis added). The newsletter continued, "effective March 23rd, 2002 Supplierpipeline Inc. will combine its Mississauga MIC Metabuilt facility *and its Milverton Newform Manufacturing facility.*" Id. (emphasis added). Further, on January 28, 2003, in an apparent reference to its "Milverton Newform Manufacturing facility," Supplierpipeline reported:

> The most recent "Pipeline Partner" welcomed to the group is Sinclair-Erie Ltd, a Canadian manufacturer of Erie wheelbarrows and contractor tools located in Milverton, Ontario. Sinclair-Erie has acquired a strong manufacturing operation in Milverton, streamlined its product offering, and is committed to delivering improved service levels within the next 60 days.

SA11.

Supplierpipeline identifies Sinclair-Erie as one of "two manufacturing partners" that it "currently operates." SA13. And, although Supplierpipeline does not list the Jackall jack as one of the products that Sinclair-Erie manufactures, Sinclair-Erie is located at the same address (37 Pacific Avenue, Milverton, Ontario) and has the same telephone and fax numbers that New-Form used. A2–63; SA3, SA13.

Through May 2003, Supplierpipeline had exported more than $2.7 million worth of merchandise into the United States—including, since November 9, 2002, $482,323 worth of merchandise of which $10,000 consisted of jack parts classified under HTS number 8431.10.0090, and $12,158 consisted of jacks. SA2 ¶ 4, SA28–46.

B. The Procedural Posture of The Case

The early stages of this action were largely uneventful—discovery was completed, a pretrial conference was held, and counsel for both parties participated in a settlement conference before another judge of this Court. Following the settlement conference, the parties were

to file reports on the prospects for settling the case, together with their recommendations as to further proceedings.

The Government's post-settlement conference report advised that settlement was unlikely, and proposed a schedule for the filing of dispositive motions. In contrast, the report filed by counsel for New-Form—barely one month after the pretrial conference—stated that the company had just declared bankruptcy, that a bankruptcy trustee had been appointed by the Canadian authorities, and that the trustee had indicated that no counsel would be engaged to represent New-Form (apparently in this or any other action). The report concluded that it was therefore impossible "to propose any further recommendations as to further proceedings in this action." Attached to the report was a copy of a document on the letterhead of the "Office of the Superintendent of Bankruptcy Canada." The document, which is captioned "Certificate of Appointment" and was filed in an action styled "In the Matter of the Bankruptcy of New-Form Manufacturing Co. Ltd.," indicates that New-Form declared bankruptcy on November 7, 2002.[4] *See also* SA 6 (indicating date of filing for bankruptcy).

Through correspondence with the Court, counsel for both parties argued the merits of various ways of proceeding in light of the bankruptcy—dispositive motions (urged by the Government), a stay of this action pending the outcome of the bankruptcy (proposed by counsel to New-Form), and application for default.[5] In the meantime, the Court and the Government began to serve all papers on the bankruptcy trustee, as well as counsel to New-Form.[6]

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[4] The notice states as the "Date and Time of Bankruptcy: November 7, 2002, 08:30."

[5] By letter dated December 5, 2002, then-counsel for New-Form advised that his law firm "[could not] continue to represent the bankrupt," but argued that it would nevertheless "be inequitable to allow a default [against New-Form], even if that default were ultimately meaningless." Thus, at least as early as December 2002, New-Form recognized that its failure to retain substitute counsel to represent its interests in this action could result in the entry of a default judgment against it.

[6] The Court and the Government have gone to great lengths to keep New-Form and its representatives apprised of the status of this action. By letter dated November 21, 2002, counsel for both parties were asked to advise how New-Form should be served in the future, in light of the company's bankruptcy and the prospective withdrawal of its counsel. That same day, the clerk of the court contacted Mr. Keith Purves, Official Receiver in the Office of the Superintendent of Bankruptcy Canada, who issued the Certificate of Appointment appended to the post-settlement conference report submitted by then-counsel to New-Form. Mr. Purves confirmed that New-Form had filed for bankruptcy and that KPMG had been appointed trustee, and advised that, as necessary, the Court should serve the Defendant through the trustee, KPMG, at a Waterloo, Ontario address which he provided.

In response to the Court's November 21 letter, then-counsel for New-Form noted that "[t]he trustee is willing to accept service of any further process in this action." Counsel's letter was "cc'd" to "Richard Sutter, Trustee." The court then began serving copies of all orders and correspondence from the court on Mr. Sutter of KPMG, as well as on then-counsel for New-Form. After then-counsel for New-Form sought leave to withdraw as counsel, the Government began serving copies of all of its submissions and correspondence on counsel to KPMG as trustee. Since that time, the court and the Government have served all papers in this action on Mr. Sutter of KPMG and/or on counsel to KPMG. In addition, most of the more recent filings—including Plaintiff's Request for Entry of Default, Plaintiff's Application for Default Judgment, the Court's May 22, 2003 Order, and Plaintiff's Second Response to Court's May 22, 2003 Order—have also been served by mail (and, in some cases, by fax as well) on Willson International Inc. (which became New-Form's broker in December 1997) and on New-Form itself (at 37 Pacific Avenue in Milverton, Ontario).

The only document returned to the Court was the copy of its Order of May 22, 2003 that was mailed to New-Form. The envelope containing that document was returned on June 12, 2003, stamped "Moved/Unknown" and "Return to Sender" by Canadian postal authorities. That same order was also faxed to New-Form's fax number on May 22, 2003. On May 26, 2003, the Court received a fax from Mr. Ted Sinclair, on the stationery of Sinclair Erie Ltd. at 37 Pacific Avenue in Milverton, Ontario (New-Form's address of record), stating: "You have sent a fax to New Form Manufacturing Ltd. New Form Manufacturing went into receivership in November 2002. The Official Receiver for New Form is Richard Sutter of KPMG, [phone and fax numbers]. Please forward all future correspon-

By letter dated January 10, 2003, a Canadian law firm representing the bankruptcy trustee sought to "confirm to [the Court] that New-Form has filed an Assignment in Bankruptcy and is bankrupt." The letter emphasized that New-Form's status "is not a *proposal* in bankruptcy, and therefore is not analogous to the U.S. Chapter 11 situation. Rather, New-Form *is* bankrupt and its assets are being disposed of for distribution" in accordance with Canadian bankruptcy law. (Emphasis added.) The letter highlighted five separately-numbered points:

> 1. New-Form is bankrupt and will not be coming out of bankruptcy.
>
> 2. The assets of New-Form are being liquidated by secured creditors rather than by the Trustee in Bankruptcy.
>
> 3. It is expected that this will be a "no asset" bankruptcy in that the claims of secured creditors will exceed the realizable value of assets, and thus there will be no distribution to unsecured creditors.
>
> 4. Under Canadian Bankruptcy Law all proceedings against New-Form are stayed unless leave of the Bankruptcy Court is granted, and no such leave has been sought or granted.
>
> 5. The Trustee has not been funded to defend the U.S. litigation, or for that matter to fund [then-counsel to New-Form in this action].[7]

Letter to Court from Aird & Berlis LLP (Jan. 10, 2003).

A second letter from counsel to the trustee painted an even bleaker picture of New-Form's status:

> There may be some confusion arising from different practises within the United States and Canada. In the United States * * * it may be relatively common for companies to seek the protection of Bankruptcy Courts * * *, while continuing business operations and to later emerge from bankruptcy. Although there are provisions for corporate re-organization [under Canadian law], this is not a circumstance where there is in reality any pending proceeding. The result is known. New Form has been adjudged bankrupt. It is not in the process of re-organization and is not and will not be carrying on any business. Its assets have been given to the Trustee for disposition and in fact have been disposed of * * *. In reality, this means

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dence to Mr. Sutter as we will no longer be forwarding."

Finally, at all times, all papers and other materials filed in this matter have been on deposit with, and available to New-Form and its representatives through, the clerk of the court, as contemplated by Rule 5(b) for service where "no address is known." USCIT Rule 5(b).

[7] The letter from trustee's counsel took pains to note that the firm was not appearing as counsel in this action.

> that all of the net proceeds of realization will be going to the former bank of New Form as its secured creditor.

Letter to Court from Aird & Berlis LLP (Jan. 29, 2003).

The letter reiterated that "New Form is not now nor will it in the future be carrying on any business," and analogized "the imposition of a civil penalty to prevent future wrong in this case" as "somewhat akin to seeking leave to impose a death penalty upon a person who is already dead." The letter concluded, "Certainly, if a hearing [in the instant action] is to proceed it will proceed on an undefended basis," expressing "doubt that there is any serious precedent value in such a proceeding (if that were the aim)." *Id.*

A teleconference was scheduled in this action for early February 2003, to allow the Court and the parties to discuss the status of the case and future proceedings, in light of the two letters from counsel to the trustee as well as other developments. In the interim, then-counsel to New-Form sought leave to withdraw its appearance in this matter, which was granted.

New-Form failed to appear for the scheduled teleconference on February 7, 2003. In the course of that teleconference, the Court and counsel for the Government weighed various procedural options. The Government argued that New-Form was already in default because of its failure to be represented on the teleconference, and advised that the Government was tentatively planning to seek a default judgment. Audiotape of February 7, 2003 Teleconference. An order issued several days later instructed New-Form to engage substitute counsel no later than March 3, 2003, warning that the company's failure to retain new counsel could result in the entry of judgment by default against it. *See* Order of February 13, 2003. There was no response of any kind to that order.

The Government filed a Request for Entry of Default on March 7, 2003. As grounds for its request, the Government pointed to New-Form's failure to retain substitute counsel as required by the Order of February 13, 2003, and invoked Rule 55(a) of the Rules of this Court, which provides for the clerk's entry of default against a party that "has failed to plead or otherwise defend." USCIT Rule 55(a). Default was duly entered on March 11, 2003.

Approximately one month later, the Government filed the Application for Default Judgment at issue here. After reviewing the Government's submission, an order was entered requiring the parties to file by specified dates certain additional information, including (1) statements as to the need for, or advisability of, a hearing or trial on damages, under the circumstances of this case; (2) statements as to whether the parties and their representatives/counsel and witnesses (if any) would appear at and participate in a hearing or trial, if one were held; (3) memoranda of law discussing the factors to be considered in determining the amount of a civil penalty, and summarizing the relevant evidence as to those factors; (4) any further evidence

which should be considered in determining the amount of a civil penalty, including "any evidence bearing on (a) the finances of Defendant and any related or successor entities, and (b) any potentially exculpatory or mitigatory evidence relating either to the issue of negligence vs. gross negligence, or to the size of any penalty"; (5) any evidence concerning New-Form's bankrupt status and the disposition of its assets; and (6) any evidence concerning "the nature and extent of the alleged involvement of Defendant's President in ongoing ventures presently doing business in the United States." Order of May 22, 2003.

In addition, the order "once again cautioned [New-Form] that its failure to take immediate action to protect is interests [might] result in the Court's entry of judgment by default against it, with no further notice." The Government responded to the order in a timely fashion. *See* Plaintiff's First Response to Court's May 22, 2003 Order; Plaintiff's Second Response to Court's May 22, 2003 Order ("Pl.'s Supp. Appl."). However, the silence from north of the border has been deafening.

In sum, notwithstanding repeated warnings of the potential consequences (including entry of default and entry of judgment by default), nothing has been heard from New-Form or from any representative of its interests since February 5, 2003, when its then-counsel withdrew from the case. New-Form was not represented on the February 7, 2003 teleconference; it failed to respond in any fashion to the Court's Order of February 13, 2003; it failed to retain substitute counsel by March 3, 2003 (as the Order of February 13, 2003 required); it failed to respond to Plaintiff's Request for Entry of Default; it never sought to set aside the default entered against it on March 11, 2003; it failed to respond to Plaintiff's Application for Default Judgment; it failed to request a hearing on damages (*i.e.*, the size of the penalty to be imposed), although the Court's May 22, 2003 Order invited it to do so; and, indeed, it flouted that Order in its entirety.

To be sure, judgment by default is an "extreme sanction"—"a weapon of last, rather than first, resort." *Meehan v. Snow*, 652 F.2d 274, 277 (2d Cir. 1981) (citations omitted). But, here, it has become abundantly clear that—as counsel to the bankruptcy trustee prophesied some months ago—if this litigation proceeds, "it will proceed on an undefended basis." Letter to Court from Aird & Berlis LLP (Jan. 29, 2003). "Extreme" action is therefore appropriate.

II. *The Legal Standard for Judgment by Default*

Judgment by default may be entered in a civil penalty action. Indeed, the procedure has been invoked in at least two prior civil penalty cases before this court. *See United States v. Quintin*, 5 CIT 260, 261 (1983); *United States v. Almany*, 24 CIT 579, 579, 110 F. Supp.

2d 977, 977 (2000).[8] Moreover, there are no special or different standards that apply in such cases. Entry of default and entry of judgment by default in civil penalty actions, as in other actions, are governed by Rule 55 of the rules of this court. *See* USCIT Rule 55.

The entry of default is a condition precedent to the entry of judgment by default. *Meehan v. Snow*, 652 F.2d 274, 276 (2d Cir. 1981). As noted above, Rule 55(a) provides for entry of default by the clerk of the court "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend."[9] USCIT Rule 55(a).[10]

Rule 55(b), in turn, governs the entry of judgment by default, requiring that "[i]n all cases the party entitled to a judgment by de-

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[8] In *United States v. Quintin*, the court denied the plaintiff's motion for default judgment in a § 1592 action and set the case for trial, for two reasons. The court first noted that, although the *pro se* defendant failed to answer the amended complaint, the amended complaint "merely contain[ed] alternative claims for damages," and the defendant had filed an answer to the original complaint. The court thus apparently concluded that the defendant was not truly in default. Second, the court further noted that, based on the existing record, it simply was "not in a position to determine the basis of damage, i.e. fraud, gross negligence or negligence." 5 CIT at 261.

In *United States v. Almany*, the court entered partial summary judgment by default finding violations of § 1592, and ordered the parties to propose a schedule for further proceedings to determine culpability. 74 F. Supp. 2d 1345, 1349 (1999). When the defendants failed to comply with the court's order, the court entered judgment on the issue of culpability, and directed the parties to propose a schedule for proceedings to determine the amount of the penalty. 74 F. Supp. 2d at 1349. Eventually, the court entered judgment against the defendants for the maximum penalty, plus interest, after the defendants failed to respond to the court's order to show cause why judgment in favor of the United States should not be granted. *United States v. Almany*, 24 CIT 579, 579, 110 F. Supp. 2d 977, 977 (2000).

There was no suggestion in either *Quintin* or *Almany* that judgment by default is, as a matter of law or policy, improper in a civil penalty case. Nor has New-Form advanced any such argument.

[9] Judgment by default may be entered not only under Rule 55, but also under Rule 16 (for example, for failure to obey a scheduling order or to participate in a pretrial conference) or under Rule 37 (for discovery misconduct), as well as under a court's inherent powers. *See generally* Judgments in Federal Court § 13.01 (1997).

[10] There is some authority to the effect that Rule 55(a) "is designed to operate at the initial stages of a lawsuit," and would thus be inappropriate here. 10 James Wm. Moore *et al.*, Moore's Federal Practice and Procedure § 55.10[2][b] (and cases cited there). Parsing Rule 55(a)'s reference to a "fail[ure] to plead or otherwise defend," those authorities reason:

> The rule is written in the disjunctive. By its express language it authorizes a default only if a party fails to plead *or* otherwise defend. Therefore, once a party has pleaded, or has otherwise defended, may that party's subsequent conduct, such as a failure to appear at trial or a failure to comply with discovery requests, be considered a subsequent failure to "otherwise defend" so as to justify the entry of a default under Rule 55(a)? The proper answer is no.

Id. Indeed, this Court endorsed that rationale in *United States v. T.J. Manalo, Inc.*, 26 CIT ____, ____ n.7, 240 F. Supp. 2d 1255, 1258 n.7 (2002).

But, however logical that position may appear at first blush, it is against the great weight of the authority. Courts across the country routinely enter default and judgment by default in circumstances similar to those presented here. *See, e.g., Alameda v. Sec'y of Health, Education and Welfare*, 622 F.2d 1044, 1048 (1st Cir. 1980) (defendant's failure to file memoranda requested by court, or to offer explanation after months of delay, constituted failure to "otherwise defend" suit); *Eagle Associates v. Bank of Montreal*, 926 F.2d 1305, 1310 (2d Cir. 1991) (partnership's failure to comply with court order to retain counsel constituted failure to "otherwise defend"); *Haxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 917–18 (3d Cir. 1992) (filing of answer to complaint did not preclude default judgment against defendant that failed to appear at trial); *Home Port Rentals, Inc. v. Ruben*, 957 F.2d 126, 133 (4th Cir. 1992) (failure to appear at show cause hearing and failure to respond to court notices constituted failure to "otherwise defend"); *McGrady v. D'Andrea Electric, Inc.*, 434 F.2d 1000, 1001 (5th Cir. 1970) (failure to appear at pretrial conference and failure to comply with court orders or rules warrants default judgment under Rule 55); *United States v. Di Mucci*, 879 F.2d 1488, 1494 (7th Cir. 1989) (where defendants failed to comply with court orders to produce documents and failed to appear at deposition, entry of default judgment under Rules 37 and 55 not an abuse of discretion); *Ackra Direct Mktg. Corp. v. Fingerhut Corp.*, 86 F.3d 852, 856–57 (8th Cir. 1996) (corporate defendant's failure to comply with court order to appoint counsel and failure to participate in litigation after counsel withdrew warranted default judgment for failure to "otherwise defend"); *Ringgold Corp.v. Worrall*, 880 F.2d 1138, 1141 (9th Cir. 1989) (failure to appear at pretrial conference and at trial warranted default judgment under Rule 55).

The dicta in *T.J. Manalo* was thus ill-considered. The result was nevertheless correct. *Cf. In re First T.D. & Inv., Inc.*, 253 F.3d 520, 532 (9th Cir. 2001) (vacating default judgment against defaulting defendants when court later granted summary judgment in favor of other defendants, because it would be incongruous and unfair to permit plaintiff to recover against some defendants on claim that was definitively determined to be invalid); *Gulf Coast Fans, Inc. v. Midwest Elecs. Imps., Inc.*, 740 F.2d 1499, 1512 (11th Cir. 1984) (default judgment against one defendant creates inconsistent verdict when other defendant prevails on merits); *see also Frow v. De La Vega*, 82 U.S. 552 (1872) (reversing default judgment as to property ownership when plaintiff lost as to answering defendants).

fault shall apply to the court therefor."[11] USCIT Rule 55(b). If the action is one in which the defendant has never appeared, and the plaintiff's claim "is for a sum certain or for a sum which can by computation be made certain," Rule 55(b) provides that, "upon request of the plaintiff and upon affidavit of the amount due," judgment by default in the specified amount shall be entered. No advance notice to the defendant is required.

In contrast, where—as here—the defendant has already appeared in an action, Rule 55(b) entitles the defendant (or its representative) to 10 days' written notice of the application for default. Moreover, if the plaintiff's claim cannot "by computation be made certain" and it is therefore "necessary to * * * determine the amount of damages," the rule provides that the court "may conduct such hearings or order such references as it deems necessary and proper." USCIT Rule 55(b) (emphasis added).

Thus, because a defaulting defendant is deemed to admit all facts "well-pleaded" in the complaint against it, an entry of default generally establishes the defendant's liability. *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975). However, in considering whether to enter judgment by default, the court is not confined to the face of the complaint and may require the moving party to present proof of facts necessary to establish liability. USCIT Rule 55(b).[12] Moreover, before entering judgment by default, the court must make an independent determination on damages, unless the sum to be awarded is certain. *Credit Lyonnais Sec., Inc. v. Alcantara*, 183 F.3d 151, 154–55 (2d Cir. 1999).

The plaintiff bears the burden of proving its entitlement to the requested damages, *Oberstar v. FDIC*, 987 F.2d 494, 505 n.9 (8th Cir. 1993), but is entitled to all reasonable inferences that may be drawn from the evidence. *Au Bon Pain Corp. v. Artect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981). In appropriate cases, detailed affidavits or other documentary evidence may suffice to fix the amount of damages for purposes of entering judgment by default. *Fustok v. Conticommodity Services, Inc.*, 873 F.2d 38, 40 (2d Cir. 1989). There is no iron-clad rule requiring a hearing or trial on damages in every case. *Id.*[13]

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[11] This is just one of several ways in which this court's Rule 55 differs from the parallel Federal Rule of Civil Procedure. Under the Federal Rules, the *clerk of the court* may enter *judgment by default* "[w]hen the plaintiff's claim * * * is for a sum certain or for a sum which can by computation be made certain" (provided that certain other conditions are met). Fed. R. Civ. P. 55(b)(1).

[12] Rule 55 (b) provides that "If, in order to enable the court to enter judgment or to carry it into effect, it is necessary * * * *to establish the truth of any averment by evidence* * * *, the court may conduct such hearings or order such references as it deems necessary and proper." (Emphasis added.) *See also Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987) (district court "heard substantial testimony and admitted documentary evidence on all of the plaintiffs' claims"); *Au Bon Pain Corp. v. Artect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981) ("district court has discretion under Rule 55(b)(2) once a default is determined to require proof of necessary facts").

[13] Rule 55(b) is, on its face, permissive: "[T]he court *may* conduct such hearings or order such references as it deems necessary and proper* * * *." Some cases nevertheless say—or at least appear to say—that an inquest, an evidentiary hearing, or a trial on damages is necessary before entering default judgment whenever a plaintiff's claim is not for a sum certain. *See, e.g., Eisler v. Stritzler*, 535 F.2d 148, 153–54 (1st Cir. 1976) (where plaintiffs' claims not liquidated, evidentiary hearing is required to assess damages before entry of default judgment); *Jackson v. Beech*, 636 F.2d 831, 835 (D.C. Cir. 1980) ("a court must hold a hearing on damages before entering a [default] judgment on an unliquidated claim even against a defendant who has been totally unresponsive"). But, even

III. *Analysis*

A. Mootness

In light of New-Form's bankrupt status, there arises—as a threshold matter — a question of mootness. The Government maintains that "there is no indisputable evidence in the record" to establish that New-Form has been adjudged bankrupt. Pl.'s Supp. Appl. at 1–2. The Government concedes that "Dun & Bradstreet reports that New-Form entered bankruptcy on November 7, 2002, and that New-Form, currently, has no assets or liabilities." Pl.'s Supp. Appl. at 2 (*citing* SA6). But, quoting Rule 201 of the Federal Rules of Evidence, the Government argues that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id.* Asserting that "the source of the information reported by Dun & Bradstreet may reasonably be questioned," the Government concludes that New-Form's bankrupt status is not subject to judicial notice. *Id.*[14]

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in jurisdictions where a hearing may have been required in the past, it seems that the rule may be eroding. *Compare Eisler, supra, with Home Restaurants, Inc. v. Family Restaurants, Inc.*, 285 F.3d 111, 114 (1st Cir. 2002) (hearing on damages not required where complaint and cross-claim sought "specific dollar figures," where court received affidavits on damages, and where defendant had opportunity to respond prior to entry of default judgment); *compare Jackson, supra, with Int'l Painters and Allied Trades Industry Pension Fund v. R.W. Amrine Drywall Co.*, 239 F. Supp. 2d 26, 30 (D.D.C. 2002) ("court may rely on detailed affidavits or documentary evidence to determine the appropriate sum for the default judgment").

The great weight of the authority thus holds that there is no "hard and fast" requirement for a hearing on damages before entering judgment by default on an unliquidated claim. *See, e.g., Fustok v. Conticommodity Services, Inc.*, 873 F.2d 38, 39 (2d Cir. 1989) (court properly relied on detailed affidavits and documentary evidence, as well as its own knowledge of case, in determining damages, where damages "were neither liquidated nor capable of mathematical calculation"); *Curtis T. Bedwell and Sons, Inc. v. Int'l Fidelity Ins. Co.*, 843 F.2d 683, 689, 697 n.25 (3rd Cir. 1988) (damages hearing not required before entering default judgment under Rule 37 where damages established through "over 200 pages of affidavits and documentation," and where preclusive order "would [have] render[ed] any hearing on damages meaningless"); *Mut. Fed. Sav. and Loan Ass'n v. Richards & Associates, Inc.*, 872 F.2d 88, 94 (4th Cir. 1989) (no abuse of discretion to enter almost $9 million default judgment under Rule 37 without hearing on damages); *James v. Frame*, 6 F.3d 307, 309–11 (5th Cir. 1993) (where $10.2 million default judgment is entered late in litigation, so that court has "long and close familiarity" with case, and "where the evidence before the court allows it to make findings based upon that evidence, the court need not jump through the hoop of an evidentiary hearing"); *United States v. DeFrantz*, 708 F.2d 310, 312–13 (7th Cir. 1983) (no damages hearing required under Rule 55 where motion for default judgment under Rule 37 specified amount of damages sought, yet defendant never questioned the sum); *Taylor v. City of Ballwin, Mo.*, 859 F.2d 1330, 1332–33 (8th Cir. 1988) (where facts on the record indicated reasonable fair market value of merchandise, court "need not hold an evidentiary hearing on the issue of damages").

In light of the affidavits and documentary evidence proffered by the Government, there is no need here for an evidentiary hearing on damages. This is all the more true since New-Form has not requested such a hearing. Indeed, New-Form never even responded to the Court's request for the company's views on the need for or advisability of a hearing. *See* Order of May 22, 2003. Nor did New-Form advise whether its representatives and/or witnesses would appear at a hearing or trial on damages if one were held, although the company was ordered to do. *Id.* New-Form's intransigence indicates that a hearing on damages would have been little more than an empty exercise. *Cf. Curtis T. Bedwell and Sons*, 843 F.2d at 697 (damages hearing not required where, *inter alia*, preclusion order "would [have] render[ed] any hearing on damages meaningless); *Davis v. Fendler*, 650 F.2d 1154, 1161–62 (9th Cir. 1981) (defendant cannot be heard to complain that default judgment was entered without hearing on damages where not only did documentary evidence substantiate damages awarded, but court scheduled hearing to address, *inter alia*, damages, and defendant waived right to appear and testify).

[14] Quite apart from the Dun & Bradstreet report, judicial notice is appropriate here. The Court may take judicial notice of the Canadian court's bankruptcy records to establish the fact that New- Form has been adjudged bankrupt in Canada. As the Court of Appeals has recognized, "[T]he most frequent use of judicial notice of ascertainable facts is in noticing the content of court records." *Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409, 1417 n.7 (Fed. Cir. 1997) (*citing Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989), *quoting* 21 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice & Procedure § 5106, at 505 (1977)). *See also United States v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (noting that court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.") (citations omitted).

However, the Dun & Bradstreet report is admissible as evidence of New-Form's bankrupt status—"for the truth of the matter asserted"—without regard to the doctrine of judicial notice. Rule 803(17) of the Federal Rules of Evidence establishes an exception to the hearsay rule for "[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." Fed. R. Evid. 803(17). The report at issue—compiled largely from public records by one of the world's leading providers of global business information, and offered through a subscriber service aimed at the business and financial communities—is clearly the sort of record contemplated by Rule 803(17).[15]

Because the Constitution generally restricts the exercise of judicial power to live "Cases" and "Controversies" (U.S. Const. art. III, § 2, cl. 1), the bankruptcy of a defendant conceivably could leave a plaintiff with no hope of recovery; and the impossibility of recovery could arguably render the case moot. However, that is not the situation here. A case is not moot as long as there is at least a metaphysical possibility of recovery. *See, e.g., Ratner v. Sioux Natural Gas Corp.*, 770 F.2d 512, 516–17 (5th Cir. 1985). As the Government notes, and as discussed in greater detail here (both above and below), the integral involvement of New-Form's President and sole shareholder — Mr. Boulanger—in Supplierpipeline, an ongoing venture presently doing business in this country, opens at least a potential avenue for recovery beyond New-Form, and thus precludes the dismissal of this action as moot. Pl.'s Supp. Appl. at 7–8.

B. Liability Under 19 U.S.C. § 1592

Although the entry of default precludes New-Form from controverting the factual allegations of the Complaint, a default neither establishes legal arguments made in the pleadings, nor requires the entry of judgment on a legally unsound claim. *See, e.g., Premier Bank v. Tierney*, 114 F. Supp. 2d 877, 880 (W.D. Mo. 2000); *In re Indus. Diamonds Antitrust Litig.*, 119 F. Supp. 2d 418 (S.D.N.Y. 2000). Thus, even after default, it must be determined "whether the unchallenged facts constitute a legitimate cause of action." 10A

However, judicial notice of a sister court's records is taken for the limited purpose of recognizing that court's judicial act. It does not recognize the sister court's findings of fact as true. *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994).

[15] The information contained in the Dun & Bradstreet report is consistent with a record produced by an "Insolvency Name Search" conducted through the official website of the Office of the Superintendent of Bankruptcy Canada using the identification number of New-Form's case—35– 103918. The website is maintained by Industry Canada, a department of the Canadian Government. The record was thus produced by an agency of the Canadian Government, and reflects factual findings made by the Canadian Office of the Superintendent of Bankruptcy, pursuant to Canada's Bankruptcy and Insolvency Act.

The record indicates as the date of bankruptcy "2002/11/07" and lists New-Form's "Total Liabilities" and "Total Assets" at $7,166,045 and $2,831,349, respectively. Those statements are admissible "for the truth of the matter asserted," because the record falls squarely within Rule 803(8) of the Federal Rules of Evidence, which excepts from the hearsay rule "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth * * * (C) in civil actions and proceedings * * * factual findings resulting from an investigation made pursuant to authority granted by law unless the sources of information or other circumstances indicate lack of trustworthiness." Fed. R. Evid. 803(8).

Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure, Civil 3d § 2688, at 63 (1998).

In this case, the unchallenged facts establish gross negligence under 19 U.S.C. § 1592. That statute prohibits parties from entering, introducing, or attempting to enter or introduce any merchandise into the commerce of the United States by means of "any document or electronically transmitted data or information, written or oral statement, or act which is material and false," or "any omission which is material." 19 U.S.C. § 1592(a)(1)(A)(i)—(ii). A violation is grossly negligent if it results from an act or acts—whether of omission or commission—"done with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute." 19 C.F.R. Pt. 171, App. B § (B)(2) (1996).[16]

Here, New-Form introduced merchandise into the commerce of this country by means of false written and oral statements, and by omissions. Customs regulations require that invoices for machine parts classifiable under the HTS specify the type of machine for which the parts are intended. 19 C.F.R. § 141.89(a). New-Form's invoices nevertheless failed to accurately describe its merchandise, in violation of the regulation. A2–63. Further, the invoices identified jack parts by HTS numbers other than HTS 8431.10.0090, the correct classification. A2–63, A182–85. On one occasion, New-Form even flatly denied to its broker that it was exporting heavy-duty jack parts. A64.

Moreover, New-Form's statements, acts and omissions were material. The measurement of materiality is the potential impact on Customs' determination of the applicable duties. *See United States v. Menard, Inc.*, 16 CIT 410, 417, 795 F. Supp. 1182, 1188 (1992). Here, New-Form exported jack parts from Canada, when jack parts from Canada were subject to antidumping duties. 61 Fed. Reg. at 6,627–28. New-Form's statements, acts and omissions related to whether its merchandise was jack parts and, thus, whether the merchandise was subject to antidumping duties.

Finally, New-Form acted with gross negligence. New-Form knew that its merchandise was jack parts to be used for jacks. A123–26 ¶¶ 56–59, A127 ¶ 64, A132 ¶ 64, A133 ¶¶ 56–59. New-Form knew that jack parts were subject to antidumping duties. A69. And New-Form knew that its broker was not paying those duties. See A133 ¶ 61. Nevertheless, on its invoices, New-Form identified its merchandise using HTS numbers that did not apply to jack parts, and failed to accurately describe the merchandise. A2–63, A182–85. Again, New-Form even denied to its broker that it was exporting jack parts. A64. New-Form's conduct thus evidenced not only its

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[16] While all citations to the Code of Federal Regulations in this opinion are to the 1996 version, the pertinent text of the referenced provisions was the same at all times relevant herein.

knowledge of and wanton disregard for relevant facts, but also its manifest indifference to and disregard for its obligations under the customs laws of this country.

C. The Size of The Penalty

The Government seeks the maximum penalty for New-Form's gross negligence—under 19 U.S.C. § 1592(c)(2)(A)(i)—(ii), the lesser of "the domestic value of the merchandise" at issue, or "four times the lawful duties, taxes, and fees of which the United States is or may be deprived." Pl.'s Appl. at 12, 14; Pl.'s Supp. Appl. at 3.

The factors to be considered in determining the size of a penalty are enumerated in *United States v. Complex Machine Works Co.*, 23 CIT 942, 949–50, 83 F. Supp. 2d 1307, 1315 (1999): (1) the defendant's good faith effort to comply with the statute; (2) the defendant's degree of culpability; (3) the defendant's history of previous violations; (4) the nature of the public interest in ensuring compliance with the applicable law; (5) the nature and circumstances of the violation; (6) the gravity of the violation; (7) the defendant's ability to pay; (8) the appropriateness of the size of the penalty vis-a-vis the defendant's business, and its effect on the defendant's ability to continue doing business; (9) whether the penalty shocks the conscience of the court; (10) the economic benefit to the defendant as a result of the violation; (11) the degree of harm to the public; (12) the value of vindicating agency authority; and (13) whether the party sought to be protected by the statute has been adequately compensated for the harm; as well as (14) such other matters as justice may require. *Id.* The first 10 factors are largely remedial and relate essentially to deterring future violations, the primary focus of Congress in enacting § 1592. Accordingly, those factors are to be accorded greater weight in determining the size of a penalty. 23 CIT at 950, 950, 83 F. Supp. 2d at 1315–16, 1319.

As discussed below, application of the *Complex Machine Works* factors to the facts of this case supports the imposition of the maximum penalty for gross negligence—$73,867.36, or four times the revenue lost by the Government (and less than the $81,537.31 domestic value of the subject jack parts). New-Form elected to present no evidence or argument in mitigation. And independent analysis reveals that all—or virtually all—of the relevant factors weigh heavily in favor of a substantial penalty; certainly, none of the factors weighs against it.

Defendant's Character: Extent of Good Faith Effort to Comply, Degree of Culpability, and History of Prior Violations

The first three factors set forth in *Complex Machine Works*—the defendant's good faith effort to comply with the statute, the defen-

dant's degree of culpability, and the defendant's history of prior violations—are indicia of a defendant's character. 23 CIT at 950, 83 F. Supp. 2d at 1316.

As *Complex Machine Works* points out, "[a] strong indicator of [a defendant's] character is whether there was a good faith effort to comply with the statute." 23 CIT at 951, 83 F. Supp. 2d at 1316. The record in this action belies any suggestion that New-Form made a significant good faith effort to comply with the law. Although New-Form retained a licensed customhouse broker, the company affirmatively denied to that broker that the merchandise at issue was jack parts. A64, A82 ¶ 7, A102 ¶ 7, A114 ¶ 10, A133 ¶¶ 56–59. Application of the "good faith effort to comply" factor thus weighs in favor of the imposition of a heavy penalty. *Cf. Complex Mach. Works*, 23 CIT at 951, 83 F. Supp. 2d at 1316 ("good faith effort to comply" factor supported heavy penalty where defendants gave inconsistent, false and uncooperative responses and explanations to Customs).

A heavy penalty is also warranted by New-Form's "degree of culpability." Specifically, New-Form knew that its merchandise was jack parts (A133 ¶¶ 56–59), that jack parts were subject to antidumping duties (A69), and that its broker was not paying those duties. *See* A133 ¶ 61. Nevertheless, on its invoices, New-Form classified its merchandise according to HTS numbers that did not apply to jack parts, and failed to describe the merchandise as parts of jacks which were to be used with jacks. A2–63, A182–85. New-Form even denied, to its broker, that it was exporting jack parts. A64. Moreover, the sheer number and frequency of New-Form's violations are telling. A84 ¶ 13, A85–87, A102 ¶ 13, A191–92 ¶ 4. This was no isolated incident. Thus, as in *Complex Machine Works*, the record here reflects a high degree of culpability and merits a penalty at the high end of the range. 23 CIT at 951–52, 83 F. Supp. 2d at 1316–17.

The "history of previous violations" factor counsels a heavy penalty as well. The duration of a defendant's current violations can weigh in favor of a heavy penalty even where there is no history of previous violations. *Complex Mach. Works*, 23 CIT at 952, 83 F. Supp. 2d at 1317. Although New-Form had no history of customs violations before it began exporting jack parts to the United States, the violations at issue here involved more than 111,000 jack parts entered on more than 30 separate occasions spanning more than a year and a half. A84 ¶ 13, A85–87, A102 ¶ 13, A191–92 ¶ 4. As in *Complex Machine Works*, the relatively longstanding course of violations in this case is significant. 23 CIT at 952, 83 F. Supp. 2d at 1317.

Seriousness of Offense:
Public Interest in Compliance, Nature and Circumstances of Violation, and Gravity of Violation

As *Complex Machine Works* observed, "[a] significant public interest in the enforcement of the regulations at issue militates in favor

of a heavier penalty." 23 CIT at 952, 83 F. Supp. 2d at 1317. There, as here, "[t]he public interest at issue * * * is the truthful and accurate submission of documentation to Customs and the full and timely payment of duties required on imported merchandise." *Id.* In this action, the Government asserts that, even though New-Form has not exported merchandise to the United States since December 2002 (SA15–16), there is "no evidence of record that [New-Form] is bankrupt, has dissolved, or that it will not resume business and exports to the United States in the future, such that a penalty would have no deterrent effect upon New-Form itself." Pl.'s Supp. Appl. at 5.

As discussed above, however, New-Form's bankrupt status is established by the Dun & Bradstreet report which was proffered by the Government and is admissible "for the truth of the matter asserted." *See* section III.A, *supra*. It is nevertheless true that, even if New-Form is permanently defunct, the imposition of a substantial penalty in this case may well have a salutory effect upon the future conduct of others exporting to this country (including, in particular, Supplierpipeline and Mr. Boulanger, both of which are closely tied to New-Form), deterring them from conduct of the type in which New-Form engaged.

The "nature and circumstances of the violations" committed by New-Form also compel a heavy penalty. New-Form knew that it was exporting jack parts that were subject to antidumping duties that its broker was not paying. Yet the invoices New-Form prepared failed to accurately describe and classify those jack parts. Indeed, New-Form even denied to its broker that it was exporting jack parts. A2–64, A133 ¶¶ 56–59, A61, A69, A182–85. As the Government so succinctly puts it, New-Form's "knowledge, failure, and denial weigh in favor of a heavy penalty." Pl.'s Supp. Appl. at 8.

For purposes of determining the size of a penalty, the "gravity of the violations" can be assessed "in terms of the frequency of the violations, the amount of the duties at issue, and the domestic value of the imported goods." *Complex Mach. Works*, 23 CIT at 953, 83 F. Supp. 2d at 1317. As in *Complex Machine Works*, the conduct at issue here "[was] not an isolated occurrence, but [rather] presents a pattern of gross disregard for and evasion of the Customs laws of the United States." 23 CIT at 953, 83 F. Supp. 2d at 1317–18. Specifically, New-Form's violations spanned more than 30 entries over a period of one and a half years—a rate of nearly one entry every two weeks. A2–63, A84 ¶ 13, A85–87, A102 ¶ 13, A191–92 ¶ 4. The amount of the duties at issue totals nearly $19,000; and the domestic value of the imported goods exceeds $81,000. A192 ¶ 5. Had interest accrued on the antidumping duties from the date of the last violation in October 1997 through October 2001 (when New-Form's broker paid the duties) (A170), the total amount would be even greater. In

short, like the other factors discussed above, the gravity of the violations here weighs decisively against New-Form and in favor of the maximum allowable penalty.

Practical Effect of Penalty:
Defendant's Ability to Pay, Relationship of Size of Penalty to Defendant's Business and Effect on Ability to Continue Doing Business, and Whether Penalty Shocks Conscience

The "defendant's ability to pay" must also be considered in determining the size of a penalty. New-Form's financial status is thus once again implicated. Again, the Government argues that there is no affirmative evidence in the record to indicate that New-Form would be unable to pay the maximum allowable penalty. Pl.'s Appl. at 15; Pl.'s Supp. Appl. at 9. The Government notes that there are, for example, no audited financial statements, or expert testimony (by, for example, a witness qualified to explain Canadian bankruptcy law). *Cf. Complex Mach. Works*, 23 CIT at 954, 83 F. Supp. 2d at 1318 (evidence such as unaudited financial statements and foreign tax returns are accorded little weight).

But, to the contrary, as discussed above, New-Form's bankrupt status is properly a matter of record in this action. Ordinarily, the bankruptcy of a defendant might contraindicate a substantial penalty (and, indeed, could conceivably moot a case). Here, however, the record evidence establishes the close relationship between New-Form and Supplierpipeline—a company which has, in recent months, exported nearly half a million dollars worth of merchandise into this country. SA2 ¶ 4. That level of business activity in the United States suggests that both Supplierpipeline and Mr. Boulanger—the President and sole shareholder of both companies (A65; SA5–6)—are potential sources for payment of any penalty imposed upon New-Form. *See* Restatement (Second) of Judgments § 59 comment g (1982) ("a judgment nominally against the corporation creates a binding obligation upon those who have acted in corporate dress"). As recently as January of this year, Supplierpipeline boasted that it was progressing "toward its goal of $100 million annual sales," and that it "has enjoyed compounded annual growth of over 50% for the last 11 years straight." SA11. Under these circumstances, consideration of the "ability to pay" factor does not preclude the imposition of a substantial penalty.

Nor does the "ability to continue doing business" factor give pause. Even if New-Form is not now doing business, and even though it has not exported merchandise to the United States since December 2002 (SA15–16), Supplierpipeline is an ongoing, closely-related business concern which appears to have sufficient resources to pay the maximum penalty without jeopardizing its continued operation. SA2, SA6, SA11.

Moreover, even the maximum penalty in this case should not "shock the conscience" of a court. The importance of the United States to a defendant's business and the degree to which the defendant disregards the customs laws of this country are relevant to this factor. *Complex Mach. Works*, 23 CIT at 954, 83 F. Supp. 2d at 1318. New-Form viewed the United States as such an important market for its jacks that it requested that Commerce review the antidumping finding that applied to those jacks (A1); and the company established an assembly operation here to reduce the applicable antidumping duties. A66 ¶ 54, A69. Even if New-Form is now bankrupt, Supplierpipeline continues to export merchandise to the United States. SA2, SA6, SA11. And, in October 2002, Supplierpipeline announced plans to "open[ ] a second Western US based warehouse * * * to further enhance coverage for the North American market." SA10. As in *Complex Machine Works*, "[s]ince [the defendants'] business relied substantially upon United States markets, a greater proportion of their assets may fairly be called upon as [a] penalty for violations of United States law." 23 CIT at 954, 83 F. Supp. 2d at 1318. This factor thus supports a heavy penalty.

Economic Benefit to Defendant Resulting from Violation

Consideration of the "economic benefit to the defendant" is damning as well. New-Form's violations resulted in lost revenue to the United States in the sum of $18,466.84 in unpaid antidumping duties (A192 ¶ 5)—savings that flowed directly to New-Form. New-Form never paid a penny of those duties; its broker paid them. A170.

Public Policy Concerns:
Degree of Harm to Public, Value of Vindicating Agency Authority, and Whether Damaged Party Has Been Compensated for Harm

While the factors discussed above relate primarily to deterring future violations, the three remaining specific factors—the degree of harm to the public, the value of vindicating agency authority, and the extent to which the damaged party has been compensated for its harm—are concerned with compensating society. Accordingly, they are to be accorded less weight. *Complex Mach. Works*, 23 CIT at 950, 955, 83 F. Supp. 2d at 1315–16, 1319. They do not, in any event, favor New-Form.

The "harm to the public" here is clear. New-Form's violations resulted in the dumping of its jack parts into the United States—which, by definition, damaged the domestic jack industry. Moreover, "the amount of harm suffered by the Government is not limited to the dollar value of duties lost." *Complex Mach. Works*, 23 CIT at 955, 83 F. Supp. 2d at 1319. New-Form's conduct necessitated a Customs investigation and eventually led the Department of Justice to bring this action. The cost of investigating and prosecuting a customs pen-

alty action is an independent harm to the Government, and is to be considered in determining the size of a penalty. *Id.*

Although its broker has (albeit belatedly) paid the duties lost as a result of New-Form's actions (A170), the Government has yet to be compensated for the expense of the administrative and judicial proceedings that New-Form's conduct spawned. Both the "harm to the public" and "adequacy of compensation" factors thus support the imposition of a substantial penalty.

So too the public interest in "vindicating agency authority" weighs against New-Form, and in favor of the Government. "[I]t is vital that the penalties imposed deter future [potential] lawbreakers from considering [conduct such as that at issue here] to ensure the submission of true and accurate statements to Customs so that the agency may carry out its functions." *Complex Mach. Works*, 23 CIT at 955, 83 F. Supp. 2d at 1319.

As discussed above, even if a heavy penalty in this case has no deterrent effect on New-Form, it may deter others who export into the United States—including Supplierpipeline and Mr. Boulanger, in particular—from engaging in the type of conduct in which New-Form engaged. *See Complex Mach. Works*, 23 CIT at 955, 83 F. Supp. 2d at 1319 (penalty may deter future exporters from engaging in similar conduct).

Such Other Matters As Justice May Require

The final "catch-all" factor to be considered is "such other matters as justice may require." On this point, the Government emphasizes that—even if New-Form is bankrupt — it entered bankruptcy less than two weeks before this action had been scheduled to go to trial. SA6; Order Governing Preparation for Trial ¶ 8 (Aug. 14, 2002) (trial to commence November 20, 2002). The Government argues that, as a matter of policy, bankruptcy should not be a haven for wrongdoers. Pl.'s Supp. Appl. at 12 (*citing Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc.*, 700 F.2d 1279, 1283 (9th Cir. 1983)). The Government therefore concludes that justice requires that New-Form's current status not shield the company from liability for its actions. Pl.'s Supp. Appl. at 12. While the case for the maximum penalty is already compelling, this final factor may also militate in favor of a heavy penalty. At a minimum, it does not weigh against it.

IV. *Conclusion*

For all the reasons set forth above, Plaintiff's Application for Default Judgment is granted. New-Form's conduct violated 19 U.S.C. § 1592, and warrants imposition of the maximum civil penalty for gross negligence—in this case, $73,867.36, plus interest and costs.

Plaintiff shall submit within 30 days hereof a proposed final judgment in conformity with this opinion, with any response by Defendant due within 10 days thereafter.

So ordered.

ERRATA

(Slip Op. 03–61)

THOMAS J. AQUILINO, JR., JUDGE, ST. EVE INTERNATIONAL, INC., PLAINTIFF *v* UNITED STATES, DEFENDANT.

Court No. 03-00068

JUDGMENT

The plaintiff having commenced this case to contest notices on Customs Form 4647 to redeliver specified women's wear imported via Entry Nos. 655–1146249–5, 655–1151865–0 and 655–115–2655–4, as well as notices of liquidated damages for failure to comply with those redelivery demands; and the plaintiff having prayed for and obtained expedited trial and decision of its complaint; and the court having issued an opinion and order, slip op. 03–54, 27 CIT ____ , ____ F.Supp.2d ____ (May 15, 2003), denying certain requested relief but finding that plaintiff's goods bearing style numbers 65132, 65134, and 27–0180–3 are correctly classifiable under subheading 6109.10.0037 of the Harmonized Tariff Schedule of the United States (2002), textile category 352, based upon a fair preponderance of the evidence developed on the record, which thereby overcame the presumption of correctness on behalf of the U.S. Customs Service; and the court having ordered the parties to confer and present a proposed form of final judgment in accordance with slip op. 03–54; and counsel having complied with that direction; Now therefore, in accordance with slip op. 03–54, and after due deliberation, it is

ORDERED, ADJUDGED and DECREED that the Customs notices of redelivery (and for liquidated damages in connection therewith) in Entry Nos. 655–1146249–5, 655–1151865–0, and 655–1152655–4 each be, and they hereby are, vacated; and it is further hereby

ORDERED that the U.S. Bureau of Customs and Border Protection reliquidate the merchandise of Entry No. 655–1146249–5 under subheading 6109.10.0037 of the Harmonized Tariff Schedule of the United States (2002) at a rate of duty of 17.4 percent *ad valorem* and

recover from the plaintiff any additional duties owed plus interest as provided by law.

NOTICE OF PROPOSED AMENDMENTS TO THE RULES

Pursuant to 28 U.S.C. § 2071(b), notice is given of certain proposed amendments were recommended by the Court's Advisory Committee, which was appointed pursuant to 28 U.S.C. § 2077(b). The proposals pertain to: **USCIT Rules (amended)** *3*, *5*, *7*, *16*, *22*, *26*, *27*, *40*, *54*, *58*, *63*, *67.1*, *68*, *70*, *71*, *72*, *73*, *74*, *78*, *79*, *81*, *82* and *82.1*; **USCIT Forms (amended)** *1*, *2*, *3*, *4*, and *9*; **USCIT Specific Instructions (amended)** for *Form 16*; **USCIT Rules (new)** *16.1*, *26.1*, *54.1*, *73.1*, *73.2*, *73.3*, *86.1*, and *86.2*; **USCIT Forms (new)** *16-1*, *16-2*, *16-3*, *16-4*, *16-5*, *20*, *M-1*, and *M-2*; **USCIT Specific Instructions (new)** for *Form 19*; and **USCIT *Guidelines for Court-Annexed Mediation* (new).** These new Guidelines were promulgated pursuant to new Rule *16.1* and make reference to new forms *M-1* and *M-2*.

This notice is given to provide the public, the bar and others interested in the work of the United States Court of International Trade with an opportunity to comment on the proposed amendments. All comments received will be forwarded to the Court for consideration.

Each proposal is accompanied by commentary describing the recommended change. Recommendations for language to be deleted from each rule appears in brackets with strikeovers. When viewed on the USCIT Website, the proposed new language will appear in red. If the proposed amendments are downloaded to a non-color printer, the proposed new language will appear in bold and/or may have a gray shaded background.

A copy of the amendments is available for review in the Court's Library, in the Records Management/Appeals Unit of the Case Management Section, and at the Court's web site: **www.cit.uscourts.gov.**

Comments are to be submitted in writing by the close of business on Thursday, **August 14, 2003** to:

Sarah A. Thornton, Chief Deputy Clerk
United States Court of International Trade
One Federal Plaza
New York, NY 10278-0001

Thank you for your interest in the work of the Court.

July 1, 2003

LEO M. GORDON,
Clerk of the Court.

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